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Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1257

CHRYSLER CREDIT CORPORATION

Petitioner

Versus

**CHERYL A. MEYERS, and
CLEARVIEW DODGE SALES, INC.,**

Respondents

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

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IN THE
SUPREME COURT
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THE UNITED STATES

October Term 1976
No.

CHRYSLER CREDIT CORPORATION,
Petitioner

Versus

CHERYL A. MEYERS and
CLEARVIEW DODGE SALES, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Chrysler Credit Corporation ("Chrysler Credit"), petitioner, prays that a Writ of Certiorari issue to review that part of the judgment of the United States Court of Appeals for the Fifth Circuit, entered on September 27, 1976, affirming the judgment of the United States District Court for the Eastern District of Louisiana, entered on November 7, 1974.

I

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit to which this petition is addressed is re-

ported at 539 F.2d 511 and also appears at page A-1 of the appendices to this petition. The Court of Appeals' order denying Chrysler Credit's petition for a rehearing was issued without an opinion; a copy of that order appears at page A-28 of the appendices.

The opinion on summary judgment of the United States District Court for the Eastern District of Louisiana that was the subject of Chrysler Credit's appeal to the Court of Appeals is reported at 384 F.Supp. 722 and also appears at page A-30 of the appendices.

II

JURISDICTIONAL STATEMENT

On September 27, 1976, the Court of Appeals entered its judgment in favor of appellee ,Cheryl Meyers,and against appellants, Clearview Dodge Sales, Inc. and Chrysler Credit Corporation, reversing in part and affirming in part the District Court's summary judgment of November 7, 1974. The Court of Appeals' order denying Chrysler Credit's timely petition for a rehearing was entered on January 3, 1977. Upon Chrysler Credit's motions to stay the Court of Appeals' mandate, filed on January 4, 1977 and February 2, 1977, the Court of Appeals, on January 12, 1977 and February 7, 1977 entered orders staying the mandate until March 14, 1977 or until final disposition by this Court of Chrysler Credit's petition for writ of certiorari. This Court has jurisdiction to hear the petition under 28 U.S.C. § 1254 (1), and the petition has been filed within the time required by 28 U.S.C. § 2101(c). Clearview Dodge Sales, Inc., a co-defendant and co-appellant in the courts below, is named as

a respondent because petitioner does not know the extent to which Clearview may be interested in this petition.

III

QUESTIONS PRESENTED FOR REVIEW

1. Whether a financial institution, which is not the seller in a credit sale, but becomes the holder of the consumer's credit obligation after the obligation's execution in the seller's favor, can properly be held liable under the Federal Truth in Lending Act for a violation arising from circumstances that were within the exclusive knowledge and control of the seller and are not apparent on the face of the documents.

2. Whether the courts below erred in holding that the Truth in Lending Act requires, in the credit sale of an automobile, that "tag and title fees" and "documentary fees," charged by the seller in both cash and credit transactions, must be separately itemized rather than included in the cash price.

3. Whether any holding that Chrysler Credit is liable should be given prospective effect only.

IV

STATUTES AND REGULATIONS INVOLVED

The petition raises questions as to the interpretation of the Federal Truth in Lending Act, 15 U.S.C.§ 1601, *et seq.*, and the Board of Governors of the Federal Reserve System's Regulation Z, 12 C.F.R. Part 226, promulgated under the

statute. Specifically, the petition urges that the decisions of the courts below have read the following provision out of the Act entirely:

> ". . . [I]n any action or proceeding by or against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgment of receipt by a person to whom a statement is required to be given by this title shall be conclusive proof of the delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this part. . ." 15 U.S.C. §1641.

Because the other pertinent provisions of the Act and Regulation are lengthy, their texts are set forth in Appendices F and G, rather than here.

V

STATEMENT OF THE CASE

Cheryl Meyers brought this suit in the United States District Court for the Eastern District of Louisiana alleging that the defendants, Clearview Dodge Sales, Inc., an automobile dealer, and Chrysler Credit Corporation, a financial institution, had violated the Truth in Lending Act. Original jurisdiction in the United States District Court was thus conferred by Section 1309e) of the Act, 15 U.S.C. §1640(e).

The transaction giving rise to the suit was Ms. Meyers' installment purchase of an automobile from Clearview. Ms.

Meyers had executed a bearer note and a chattel mortgage naming Clearview as mortgagee. These papers were combined in a single document that also included a truth-in-lending disclosure statement, of which Ms. Meyers was given a copy. A conformed copy of the combination document is found at Appendix H. By means of what purports to be an assignment in the document, Chrysler Credit subsequently became the holder of the note and chattel mortgage, although Clearview was obligated to repurchase them in the event of default. Plaintiff sued both Clearview and Chrysler Credit alleging errors and omissions in the disclosure statement.

Through similarly structured transactions, several different financial institutions regularly become holders of the notes and chattel mortgages Clearview accepts in credit sales. Before accepting the document, Clearview will seek approval of the customer's credit by one or more of the potential holders. After the credit sale has been consummated, Clearview assigns the documents, at a discount, to one of the approving institutions, generally the one that has offered Clearview the best terms (amount of discount, type of recourse, etc.).

Before it receives the assigned credit documents, the financial institution knows practically nothing about the credit sale transaction except for the credit limits it has deemed acceptable with respect to the customer. The financial institution does not see the customer, is not present at the dealership, and does not even know that an "approved" note and chattel mortgage will be assigned to it until after the credit sale has been completed and the dealer has determined to whom the papers will be assigned.

After acceptance of an assignment, Chrysler Credit knows only what it can discern from the note, chattel mortgage and disclosure statement. If this combination document appears complete and regular on its face, and conforms to the credit limits previously approved, then Chrysler Credit will accept the assignment. Otherwise, the papers will be returned to the dealer.

Even if Chrysler Credit accepts the assignment, Clearview continues to bear the principal risk of credit because it is obliged to repurchase the obligations in the event its customer defaults. The *consumer* credit transaction, then, is essentially between the consumer and Clearview.

In this case, the only findings of truth-in-lending violations that were sustained by the Court of Appeals were the dealer's inclusions of "tag and title fees" and a "document fee" in the cash price. Clearview charged these fees -- for its services in registering, licensing and making the vehicle ready -- in *all* transactions, without regard to whether a sale was cash or credit. Not all dealers charge these fees, however, and the disclosure statement on the note and chattel mortgage assigned to Chrysler Credit did not indicate that any such fees had been charged to Ms. Meyers. Chrysler Credit, therefore, could not determine from the document it received that Clearview had included such fees in the cash price.

Despite the fact that Chrysler Credit became legally related to Ms. Meyers only upon acceptance of Clearview's assignment of Ms. Meyer's note and chattel mortgage after the consummation of the credit sale, despite the fact that Chrysler Credit was never in a position to have knowledge of the terms of the credit sale other than the credit limits

and the information appearing on the face of the note, chattel mortgage and disclosure statement, and despite the Truth in Lending Act's express limitation of subsequent assignees' liability to disclosure errors apparent on the face of the documents, the courts below held that Chrysler Credit was liable for Clearview's inclusion of its incidental "fees" in the cash price.

VI

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT BELOW CONFLICTS WITH A DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT RESPECTING THE LIABILITY OF NON-SELLER CREDITORS IN CREDIT SALE TRANSACTIONS

No one disputes the fact that the transaction giving rise to this suit was a credit sale.[1] The courts below, however, went further. Ignoring the facts that:

(1) Ms. Meyers credit obligation had been executed in favor of Clearview,

(2) Clearview then assigned that obligation to Chrysler Credit, and

(3) Chrysler Credit's only knowledge of the transaction

---

1. Disclosures in credit sales are governed by distinct portions of the Truth-in-Lending Act and Regulation Z, 15 U.S.C. §1638 and 12 C.F.R. § 226.8(b) and (c), while disclosures in nonsale transactions, such as direct loans, are governed by other provisions of the Act and Regulation, 15 U.S.C. § 1639 and 12 C.F.R. § 226.8(b) and (d).

> before it accepted that assignment was the limit of credit it was willing to accept and information on which that limit was based,

the courts below mistakenly characterized the transaction as an "arrangement of credit",[2] in which Clearview arranged to have Chrysler Credit extend credit to Ms. Meyers at the outset. The lower courts went on to hold that both Clearview and Chrysler Credit were jointly liable for any failure to make the disclosure required in credit sales.[3]

Manning v. Princeton Consumer Discount Co., 533 F. 2d 102 (3rd Cir.), *cert. denied*, —U.S. —, 50 L.Ed. 2d 144 (1976), also involved the installment sale of an automobile, which the Court of Appeals for the Third Circuit also characterized as a credit sale and a credit arrangement. 533 F.2d at 104. Yet the Third Circuit held that only the credit

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2. The credit arrangement concept is derived from the Act's and Regulation's definition of a creditor as one who "regularly extends or arranges for the extension of consumer credit." 12 C.F.R§ 226.2(s); see also 15 U.S.C.§ 1602(f). The only definition of "arrange for the extension of credit" is found in the Regulation, at 12 C.F.R.§ 226.2 (h):

> *"Arrange for the extension of credit* means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit
>
> (1) Receives or will receive a fee, compensation, or other consideration for such service, or
>
> (2) Has knowledge of the credit terms and participates in the preparation of the contract documents required in connection with the extension of credit."

3. 539 F.2d 511, 515; 284 F.Supp 722, 728-29.

arranger (the seller) was liable for violations resulting from a failure to make the disclosures required in credit sales.

The Third Circuit in *Manning* placed specific reliance upon section 226.6(d) of Regulation Z, which apportions disclosure responsibilities in multiple creditor transactions, *i.e.*, those in which there are two creditors -- a credit extender and a credit arranger. Section 226.6(d) provides in relevant part:

> ". . .[E]ach creditor . . . shall be responsible for making only those disclosures required by this Part which are *within his knowledge and the purview of his relationship with the customer. . .* The disclosures required under paragraphs (b) and (c) of § 226.8 [pertaining to credit sales] *shall be made by the seller* if he extends or arranges for the extension of credit . . ." (Emphasis added.)

Applying this language to the *Manning* credit transaction, the Third Circuit explained:

> "The regulation requires that if the seller extends or arranges credit, as occurred here, then it must make the disclosures required under (b) and (c) of Regulation § 226.8. As we observed earlier, those two subsections track § 128 [15 U.S.C. §1638] of the Act. By transposition, the Regulation states that the disclosures required by the Act's §128 for credit sales shall be made by the seller when he extends or arranges for the extension of credit." 533 F.2d at 105.

The Court went on to hold that, when the seller arranges credit, the last sentence of section 226.6(d) places upon him the obligation to make the disclosures. The court rejected the plaintiff's contention that the financial institution could also be held liable for a failure to make the credit sale disclosures.[4]

In the instant case, as in *Manning*, the courts characterized the transaction as a credit sale in which credit was arranged by the seller. In the instant case, as in *Manning*, the seller allegedly violated the credit sale disclosure requirements of 15 U.S.C. § 1638 and 12 C.F.R. § 226.8(b) and (c).[5] In the instant case, as in *Manning*, the financial institution argued that section 226.6(d) of Regulation Z places the obligation to make those disclosures, and liability for failure to make them, solely upon the seller. The Court of Appeals for the Third Circuit in *Manning* accepted that argument; the Court of Appeals in this case, where the financial institution was further removed from the credit sale, completely ignored the argument, neither citing nor discussing the pertinent portion of the regulation.

If the Fifth Circuit's characterization of Clearview as credit arranger is accepted, then there is a direct conflict be-

4. While the financial institution in *Manning* made the direct loan disclosures required by 15 U.S.C. § 1639 and 12 C.F.R. § 226.8(b) and (c), the Third Circuit correctly attributed no significance to that fact; in *Manning*, as in this case, the plaintiff sought to impose liability for an alleged failure to make the credit sale disclosures mandated by 15 U.S.C. § 1638 and 12 C.F.R. § 226.8(b) and (c).

5. The only finding of a violation sustained by the Court of Appeals for the Fifth Circuit was Clearview's failure to itemize tag, title and documentary fees, which, the Court held, contravened 12 C.F.R. §226.8(c) (4).

tween the law in the Third Circuit and the law in the Fifth Circuit respecting multiple creditor liability in credit sales.

2. THE PROPER MEANS OF HARMONIZING THIS CASE WITH *MANNING* IS TO REJECT THE LOWER COURT'S CHARACTERIZATION OF THE MEYERS TRANSACTION AS A CREDIT ARRANGEMENT.

The *Manning* case involved a true credit arrangement: after reaching an agreement on the sale of the automobile the dealer escorted the customer to the financial institution's premises, where the customer executed a credit contract between the financial institution and herself and received the financial institution's check payable jointly to the dealer and herself. The dealer received a fee from the financial institution for arranging the credit transaction.

This case did not involve a credit arrangement; it involved a subsequent assignment. Chrysler Credit was neither present at, nor a party to, the consummation of the *extension* of credit to Ms. Meyers. While Chrysler Credit and other institutions may have approved limits of credit on obligations by Ms. Meyers that they might later accept from Clearview, the negotiation of the sale terms and of the credit terms was between Clearview and Ms. Meyers alone. When an agreement was reached, she executed a bearer note and a chattel mortgage naming Clearview as mortgagee. These were on forms provided by Chrysler Credit, but they could have been assigned (as they regularly are) to any of the institutions who might have approved credit limits not exceeded by the transaction. The note and chattel mortgage were, in fact, assigned to Chrysler Credit three days

after Ms. Meyers had executed them. Until Chrysler Credit accepted the assignment, Clearview was Ms. Meyers' sole obligee.

Because an assignee like Chrysler Credit is not privy to the terms of the underlying credit *sale*, the Truth in Lending Act contains special provisions relating to assignee liability. 15 U.S.C. §1641 provides:

> "*Written acknowledgment as proof of receipt.* Except as provided in §1635(c) [relating to certain transactions involving real estate] and except in the case of actions brought under §1640 (d)[where there is security interest in real estate], *in any action* or proceeding by or *against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgment of receipt by a person to whom a statement is required to be given by this title shall be conclusive proof* of the delivery thereof and, unless the violation is apparent on the face of the statement, *of compliance with this part...*" (Emphasis added.)[6]

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6. 15 U.S.C. §1614 re-affirms the limited nature of assignee creditors' liability:

> "Except as otherwise specifically provided in this title, any civil action for a violation of this title which may be brought against the original creditor in any credit transaction may be maintained against any subsequent assignee of the original creditor where the violation from which the alleged liability arose is apparent on the face of the instrument assigned unless the assignment is involuntary."

(Footnote 6 - continued on next page).

When the Fifth Circuit rejected, as an elevation of "form over substance," Chrysler Credit's argument that it was a subsequent assignee, it effectively repealed section 1641 of the Act: if the instant transaction was not a subsequent assignment, what is?

The Fifth Circuit premised its holding on the erroneous assumption that, "Clearview never assumed any of the risks . . ." of credit. 539 F.2d 515. Because of its repurchase obligation, however, Clearview bore the substantial risk of credit, even after the assignment.

The subsequent assignment provisions of the statute were obviously intended to apply to this very kind of transaction, just as the credit arrangement provisions of the Regulation were intended to apply to the transaction in *Manning*. The Fifth Circuit's confusing the two kinds of transactions and then refusing to apply the appropriate section of Regulation Z, as done in *Manning*, has left the federal jurisprudence respecting multiple creditor transactions in a state of utter confusion. How can Chrysler Credit logically be held liable for Clearview's violations, when the financial institution in *Manning*, which was present at the extension of credit, was exonerated from liability for the dealer's much more obvious violations?

Footnote 6 - continued from previous page

This provision was added to the Act, after this suit was brought (P.L. 93:495 October 28, 1974), to obviate the "conduit theory" by which some courts felt constrained to impose liability on assignee creditors who contended they were not subject to the Act at all. *See e.g., Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86 (8th Cir. 1976). Chrysler Credit has never contended that it was not subject to the Act altogether.

There was no necessity for the Fifth Circuit's torturing the Act and Regulation so, because Chrysler Credit has always acknowledged that it could properly be held liable for truth-in-lending violations over which it had control, such as defects in the forms it provides the dealers or other violations apparent on the face of the document. The Fifth Circuit, however, has imposed upon assignee creditors a form of vicarious liability for violations over which they have no control and of which they have no notice. Such a result clearly contradicts the intent of the drafters of section 1641, and it is unfair.

In a case nearly identical to this one, United States District Judge Morey L. Sear refused to follow the Court of Appeals' characterization of Chrysler Credit as an "original creditor." Applying section 1641, he held that Ford Motor Credit Company was not liable for the dealer's non-apparent violations. *Williams v. Bill Watson Ford, Inc.*, E.D. La. C.A. No. 74-3379, opinions set out in Appendix J.

If Chrysler Credit is correctly characterized as a subsequent assignee, then section 1641 would fairly and appropriately limit its liability consistently with the limitation placed by Regulation Z, section 226.6(d) upon the liability of the non-seller creditors in a true credit arrangement, as recognized in *Manning*.

3. THE COURT OF APPEALS ERRONEOUSLY INVALIDATED THOUSANDS OF AUTOMOBILE CREDIT SALE DISCLOSURES WHEN IT HELD THAT LICENSE AND DOCUMENT FEES CANNOT BE INCLUDED IN THE CASH PRICE

At 539 F.2d 517-19, the Court of Appeals held that

Clearview's inclusion of a "documentary service fee" and a "license tag and title fee" in the cash price constituted a violation of Regulation Z sections 226.2(n), 226.4(b), and 226.8(c)(4). Specifically, the Court held that because the "tag and title fees" and the "documentary service fee" were included in the amount financed, but were neither fees for "service related to the sale" nor parts of the finance charge, they should have been separately disclosed under the "other charges" provision of Section 226.8(c)(4).

Support for the Court's holding respecting tag and title fees is found in *Starks v. Orleans Motors, Inc.*, 372 F.Supp. 928 (E.D. La.), *aff'd summarily*, 500 F.2d 1182 (5th Cir. 1974), which the Court cited. *Starks* is incorrect to the extent it requires disclosure of any fees that are charged to cash and credit customers alike, and are not incident to the extension of credit. *St. Germain v. Bank of Hawaii*, CCH Consumer Credit Guide ¶98,434 at pp. 87,874-76 (D. Haw. 1976).

However, in support of its holding that the documentary service fee also had to be disclosed, the Court cited and discussed at footnote 18 of its opinion a Federal Reserve Board staff letter which opines directly to the contrary:

> "The following FRB staff opinion letter was brought to the Court's attention by appellants in support of their argument that these charges need not be disclosed. However, upon close examination it clearly supports the conclusion reached above.
>
> '[This is on] the proper treatment under Regulation Z for certain charges assessed by an auto-

mobile dealer in connection with the sale of an automobile. The types of charges in question can be described in five different categories, as follows:

'(1) a title application fee which the dealer collects as a designated agent of the State, a portion of which is forwarded to the State, with the dealer retaining a portion as his commission in accordance with State law;

'(2) an inspection fee required by state law;

'(3) a *documentary and make-ready fee* retained entirely by the dealer, which is intended to cover expenses incurred by the dealer in upkeep of the car prior to sale as well as fees for notarizing the various documents prepared in each transaction;

'(4) State sales tax; and

'(5) a statutory fee of $2.50 for obtaining the release of lien when the indebtedness is paid.

'The first four categories of charges are assessed whether the transaction is for cash or is financed. The fifth category is assessed only when the transaction is financed. The question is whether the fees should be included in the "cash price" or separately disclosed under "other charges" under §226.8(c).

'Since charges (2), (3) and (4) are not imposed as a condition of or incident to the extension of credit, and need not be itemized to be excludable from the finance charge under § 226.4(b), they may be included in the cash price or *they may be included as "other charges" (if financed).* However, in the case of charges (1) and (5), *such charges must be itemized and disclosed to the customer under §226.4(b) in order that they may be excluded from the finance charge. If such charges are financed* (rather than being paid in cash), *they should be disclosed as "other charges".*' [emphasis (italics) added (by the Court)]. F.R.B. Letter No. 623 by G. Garwood, August 9, 1972. CCH CCG 30.872. See also F.R.B. Letter by J. Kluckman, January 23, 1973, CCH Consumer Credit Guide ¶30,935.' " (Italics by the Court of Appeals, underlining by petitioner.)

Another letter, cited but not discussed by the Court of Appeals, re-affirms that document fees *"may be included in the cash price."* F.R.B. Letter of January 23, 1973 by J. Kluckman, reported at CCH Consumer Credit Guide ¶30,935.[7]

We cannot explain why the Court of Appeals purported to follow these letters, yet ruled directly contrary to them. The error, however, has far-reaching significance. Many dealers are required by their states' automobile sales laws or regulations[8] to include documentary fees in the cash price,

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7. This letter is reproduced in Appendix K.

8. See *e.g.* copies of letters from California and Texas Officials, Appendix L.

and the practice is common in states where it is not required. Thus many thousands of disclosures have effectively been invalidated by the Fifth Circuit, and creditors who relied upon the Federal Reserve Board letters have been unfairly exposed to significant potential liability.

4. ANY HOLDING THAT CHRYSLER CREDIT IS LIABLE SHOULD BE GIVEN PROSPECTIVE EFFECT ONLY

This Court has previously applied the doctrine of prospective limitatioin to avoid the potentially harsh results of decisions that make new law. In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.Ed. 2d 296 (1971), this Court decided that an adjacent state's statute of limitation or prescription applies to torts committed on the outer continental shelf. The Court went on to hold, however, that its decision would have prospective effect only. In so holding, the Court reviewed the prior application of the prospectivity doctrine.

> "In recent years, the nonretroactive application of judicial decisions has been most conspicuously considered in the area of the criminal process. . . But the problem is by no means limited to that area. The earliest instances of nonretroactivity in the decisions of this Court--more than a century ago--came in cases of nonconstitutional, noncriminal state law. . . It was in a noncriminal case that we first held that a state court may apply its decision prospectively . . . And, in the last few decades, we have recognized the doctrine of nonretroactivity outside the criminal area many

> times, in both constitutional and nonconstitutional cases. . ." 404 U.S. at 105 - 06, 30 L.Ed 2d at 305 (Citations and footnotes omitted).

At least two district courts have applied prospective limitation in truth-in-lending suits. *Kessler v. Associated Finance Services, Inc.*, 405 F.Supp. 122 (D. Haw. 1975); *Woods v. Beneficial Finance Co.*, 395 F.Supp. 9 (D. Ore. 1975).

Neither of the courts below appeared to have considered the possibility of prospective limitation, although Chrysler Credit urged and briefed the point in both courts.[9]

This case meets all the tests for prospective limitation set out in *Huson, supra*, 404 U.S. 106-07. The results reached below, especially the Court of Appeals' holding on the document fee issue, made new law at substantial variance with the reasonable expectations of those to whom the rulings applied. Prospective limitation will not retard the operation of the truth-in-lending laws. The violations found by the courts below resulted solely from good faith errors (if, indeed they were errors, which petitioner strenuously denies) in the interpretation of a complex and confusing regulation, and they will certainly be corrected if the lower courts' holdings are sustained. In fact, creditors are already attempting to comply with the law as interpreted by the courts below; but there are still many outstanding contracts and disclosures in which the document fee

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9. In the District Court Chrysler Credit moved to alter or amend the November 7, 1974 judgment by including prospective limitation. That motion was denied without opinion. Chrysler Credit devoted ten pages of its original brief to the issue in the Court of Appeals, and again urged prospective limitation in its petition for rehearing, but was unable to elicit even a passing comment from the Court of Appeals.

was included in the cash price. Where the purpose of the statute construed is deterrence, and that purpose has been accomplished, prospective limitation is "strongly indicated." *Nelson v. Schmidt*, 373 F.Supp. 705 (W.D. Wis. 1973).

Because the supposed violations, in this case were technical, unintentional, and, we believe, harmless, it would be inequitable to penalize Chrysler Credit and other financial institutions beyond the award made by the District Court. The Supreme Court of South Dakota recently adopted this rationale in denying retroactive application of its ruling that certain practices regarding revolving charge accounts constituted usury:

> "In the area of time-price sales and whether or not they were usurious, the Arkansas court in Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W. 2d 973, gave prospective application to its decision. We have concluded to do the same in the interest of justice. To do otherwise we feel would be unfair and would result in undue hardship to many persons and business institutions who in good faith entered into revolving charge account agreements with their customers under the belief that they were within the time-price exemption from our usury statutes." *Rollinger v. J.C. Penney Co.*, CCH Consumer Credit Guide ¶99,275 (S.Ct. S. Dak. 1971).

While the purposes of the Truth in Lending Act are unquestionably laudable, in practice the Act has been much abused by attorneys who have brought duplicative lawsuits by the hundreds, based upon the most hypertechnical theories of violation. See opinion of Bankruptcy Judge Norton in *McDaniel v. Fulton National Bank of Atlanta*, CCH Consumer Credit Guide ¶98,683 (N.D. Ga. 1974), and remarks of Senator Jake Garn, 122 *Cong. Rec.*, No. 56 (April 13, 1976). While we do not suggest that this case represents such an abuse of the Act, we do urge that the Court's judicious application of the doctrine of prospective limitation to any findings of violation that are sustained would discourage continued abuses in other cases.

VII.

CONCLUSION

The law respecting the liability of multiple creditors in a "credit arrangement" credit sale has been left in shambles by the opinions of the courts below. The confusion can be cleared, and this case can be harmonized with *Manning v. Princeton Consumer Discount Co., supra*, by the Court's granting the writ and characterizing the transaction as it was intended to be characterized by the parties – and by Congress. If Chrysler Credit was thus a subsequent assignee, the judgment against it must be reversed on the basis of 15 U.S. C. §1641. Even if Chrysler Credit was not an assignee, the judgment must be reversed on the basis of 12 C.F.R. §226.6 (d).

Additionally, the writ should be granted to correct the Court of Appeals' error in reading the Regulation and the Board's staff opinion to forbid the inclusion of document fees in the cash price. The almost universal practice, which has been required by some states, has been consistent with the dealer's practice in this case. Unless the Court of Appeals' error is corrected, thousands of disclosures will have been rendered defective, and many dealers will be left with

the Hobson's choice of necessarily violating state or federal law.

Finally, the Court should grant the writ so that it can apply the doctrine of prospective limitation to any violation sustained. Such an application would encourage lower courts to do likewise and would help to discourage some of the duplicative and abusive lawsuits that have been brought under the Act.

Respectfully submitted,

BY:_____

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CERTIFICATE OF SERVICE

The undersigned counsel for petitioner, has caused service to be made upon all counsel of record, either by hand delivering or placing in the U.S. Mails, first class, postage prepaid, two copies of the within Petition, this 8th day of March, 1977.

_____

JAMES K. IRVIN

APPENDIX A

OPINION OF COURT

Cheryl A. MEYERS, Plaintiff-Appellee-Cross Appellant

v.

CLEARVIEW DODGE SALES, INC., - Defendant-Appellant
Cross Appellee,

Chrysler Credit Corporation, Defendant-Appellant

No. 75-1303

United States Court of Appeals, Fifth Circuit

Sept. 27, 1976

An automobile dealer appealed from an award of statutory penalties and attorney's fees to an automobile buyer by the United States District Court for the Eastern District of Louisiana, at New Orleans, 384 F.Supp. 722, Frederick J. R. Heebe, Chief Judge, in a suit for various violations of the Truth in Lending Act and regulation Z promulgated thereunder. The Court of Appeals, Lynne, District Judge, held, inter alia, that both the dealer and the automobile manufacturer's credit corporation were "creditors" as defined by the Act and regulation Z; that failure to disclose the "finders fee" paid to the dealer by the credit corporation as an element of the finance charge was not a violation of the Act; that failure to itemize the amounts charged for "tag, title and fees" and for "Documentary Service Fee" under the "other charges" portion of the disclosure statement constituted a violation; and that failure to disclose the creditor's right of acceleration as a "default, delinquency or similar

charge payable in the event of late payment" was not a violation.

Affirmed in part; reversed in part and remanded.

1. Pawnbrokers and Money Lenders 6.1

Where automobile dealer did not ordinarily finance credit sales itself, but prearranged assignment of commercial paper as regular and essential part of its business and, in automobile sale transaction at bar, prearranged assignment of buyer's paper to automobile manufacturer's credit corporation, credit corporation was "creditor" under Truth in Lending Act, and was not entitled to limited protection as "subsequent assignee." Truth in Lending Act,§§103(f), 131 as amended 15 U.S.C.A.§§1602(f), 1651; Truth in Lending Regulations, Regulation Z, § 226.2(h, s), 15 U.S.C.A. following section 1700.

See publication Words and Phrases for other judicial constructions and definitions.

2. Pawnbrokers and Money Lenders - 6.8

Where automobile dealer prearranged customer's credit with automobile manufacturer's credit corporation and immediately assigned customer's contract to it, amount set aside by credit corporation in reserve account for dealer, while it constituted "fee, compensation or other consideration" received by dealer for its services to credit corporation in initiating transaction, did not constitute "finders fee" which was required to be disclosed in disclosure statement as required by Truth in Lending Act as element of finance charge. Truth in Lending Regulations, Regulation Z,§§226.2 (h)(1), 226.4(a), (a)(3, 1-8), 226.8(c), (c)(8)(k), 15 U.S.C.A. following section 1700; Truth in Lending Act, § 106(a) as amended 15 U.S.C.A. §1605(a).

The publication Words and Phrases for other judicial constructions and definitions.

3. Pawnbrokers and Money Lenders - 6.8

Where finance charge assessed in connection with installment purchase of automobile included only precomputed interest, disclosure statement satisfied requirements of Truth in Lending Act when it disclosed total dollar amount of such charge, using term "finance charge," and statement was not required to describe such charge as precomputed interest. Truth in Lending Regulations, Regulation Z,§§226.8(c)(8)(i), 226.820, 15 U.S.C.A. following section 1700.

4. Pawnbrokers and Money Lenders - 6.8

Disclosure statement covering credit purchase of automobile was insufficient under Truth in Lending Act when it failed to itemize amounts charged for "tag, title, and fees" and for "Documentary Service Fee" under "other charges" portion of statement, but instead included such fees in total "cash price" of automobile. Truth in Lending Regulations, Regulation Z,§§226.2(n), 226.4(b),(b)(4), 226.8(c), (C)(4), 15 U.S.C.A. following section 1700; Truth in Lending Act, §106(d) as amended 15 U.S.C.A.§ 1605(d).

5. Pawnbrokers and Money Lenders - 6.8

Creditors right of acceleration was not "default, delinquency, or similar charge payable in the event of late payment" within meaning of Truth in Lending Act, and Act was therefore not violated when automobile dealer failed to disclose such right in statutorily-required disclosure statement. Truth in Lending Act, § 128(a)(9) as amended 15 U.S.C.A. §1638(a)(9); Truth in Lending Regulations, Regulation Z, §226.8(b)(4).

See publication Words and Phrases for other judicial constructions and definitions.

6. Pawnbrokers and Money Lenders - 6.8

Where, under Louisiana law, confession of judgment clause contained in chattel mortgage given by installment buyer of automobile, unlike common-law confession of judgment, gave creditor no greater rights in debtor's property than "mortgage, lien and privilege" which was adequately disclosed in disclosure statement prepared in compliance with Truth in Lending Act, such confession of judgment provision was not "security interest" which had to be described in disclosure statement. Truth in Lending Regulations, Regulation Z,§§ 226.2(gg), 226.8(b)(5), 226.202, 15 U.S.C.A. following section 1700.

See publication Words and Phrases for other judicial constructions and definitions.

7. Pawnbrokers and Money Lenders - 6.9

Where automobile dealer and automobile manufacturer's credit corporation acted jointly in extending credit for automobile purchase and were responsible for making joint disclosure of information required by Truth in Lending Act, separate statutory penalties would not be levied against each when disclosure statement was later found to be inadequate; rather, they would be found jointly and severally liable for statutory penalties and attorney's fees. Truth in Lending Act,§§ 130, 130(a, g) as amended 15 U.S.C.A. §§ 1640, 1640(a, g); §408(e), 15 U.S.C.A. §1640 note; Truth in Lending Regulations, Regulation Z, §§ 226.6(d), 226.8(a, c), 15 U.S.C.A. following section 1700.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before WISDOM and MORGAN, Circuit Judges, and LYNNE, District Judge.

LYNNE, District Judge:

This is an appeal from an award of statutory penalties and attorneys' fees to appellee, Cheryl A. Meyers, by the United States District Court for the Eastern District of Louisiana, for various violations of the Truth in Lending Act, 15 U.S.C. §1601 *et seq.*, and Regulation Z thereunder, 12 C.F.R. §226.1 *et seq.*, by appellants Clearview Dodge Sales, Inc. (Clearview), and Chrysler Credit Corporation (Chrysler Credit) in the credit sale of an automobile. The case presents a number of significant questions concerning the interpretation of several provisions of the Act and Regulation Z.

On June 23, 1972 Cheryl Meyers (Meyers) visited the showroom of Clearview, was shown various automobiles, and agreed to purchase a 1972 Dodge Swinger if proper financing was available. Having made her selection, appellee signed a Retail Buyer's Order, describing the automobile, its sales price, the general credit terms, and other conditions of the sale. However, the sale was not finalized at this point in the transaction. Since Clearview did not finance credit sales itself, it had to obtain credit approval for appellee from one of the four or five institutional lenders with which it regularly dealt. Therefore, Meyers also filled out and signed a credit application to be used by Clearview in its attempts to secure financing for her purchase. This credit application was submitted to Chrysler Credit for its approval, and following a credit check, Chrysler Credit agreed to purchase the appellee's note and installment contract from Clearview if later presented to it properly executed. Clearview then noti-

fied appellee that her credit had been approved, and using the information from the retail buyer's order, prepared a combination contract, disclosure statement, chattel mortgage and promissory note on a form supplied by Chrysler Credit. Appellee returned to Clearview's place of business on June 26, 1972, to sign the retail installment contract and pick up her car.

The document Meyers signed consummating this credit transaction was a standard Chrysler Credit form entitled "Sale and Chattel Mortgage." According to this document, Clearview appears as the seller and mortgagee of the car. However, the installment contract was immediately sold to Chrysler Credit at a discount, according to the terms of the "Vehicle Financing and Repurchase Plan" in effect between appellants. Chrysler Credit was not identified as a creditor, or otherwise, on the face of this document.

On April 13, 1973, appellee commenced this action against Clearview, as a credit arranger, and Chrysler Credit, as a credit extender, contending that five disclosures mandated by the Truth in Lending Act and Regulation Z had not been made and that both defendants were liable to her for statutory penalties and attorney's fees. The case was submitted to the district court on cross motions for summary judgment and stipulated facts. On October 31, 1974, the court below granted plaintiff's motion for summary judgment and found appellants jointly and severally liable to the plaintiff for the statutory penalty and attorney's fees. *Meyers v. Clearview Dodge Sales, Inc.*, 384 F.Supp. 722 (E.D.La. 1974).

The district court found that both appellants were "creditors" as defined by the Act and Regulation Z, and were therefore jointly responsible for making the required disclosures. Chrysler Credit alone appeals this determination.

We agree.

The lower court further found the following specific violations of the disclosure requirements of the Truth in Lending Act and Regulation Z:

> (1) the failure to disclose the "finder's fee" paid to Clearview by Chrysler Credit as an element of the finance charge as required by section 226.4(a)(3) of Regulation Z;
>
> (2) the failure to itemize the amounts charged for "tag, title and fees" and for "Documentary Service Fee" under the "other charges" portion of the disclosure statement as required by section 226.4(b) of Regulation Z; and
>
> (3) the failure to disclose the creditor's right of acceleration as a "default, delinquency, or similar charge payable in the event of late payment" as required by section 128(a)(9) of the Act, 15 U.S.C. § 1638(a)(9), and section 226.8(b)(4) of Regulation Z.

Both appellants contest these findings. We affirm the district court's finding with respect to violation (2) above. However, we reverse as to findings (1) and (3).

On cross-appeal, appellee challenges the district court's determinations (1) that the creditor's confession-of-judgment provision need not be disclosed as a section 226.2(gg) "security interest," and (2) that appellee is entitled to but a single award of the statutory penalty. We agree that these findings are correct, and affirm both holdings.

The appellee also seeks an award of attorney's fees for work done on appeal. In accordance with *Thomas v. Meyers-Dickson Furniture Company*, 479 F.2d 740, 748 (5th Cir.

1973), we conclude that attorney's fees are authorized for appellate legal work, and direct the district court to award such fees it determines to be reasonable.

I. *Chrysler Credit Corporation: Creditor or Subsequent Assignee.*

[1] Appellant Chrysler Credit insists that the district court erred in classifying it a creditor in this consumer credit transaction. It strenuously argues that Clearview extended credit to Meyers, and that it was merely a "subsequent assignee" of the original creditor. Appellee, on the other hand, contends that both appellants are creditors and should be separately liable for failing to make the required disclosures. Chrysler Credit seeks to be classified as a "subsequent assignee" in order to avail itself of the limited protection of 15 U.S.C. § 1641.[1]

Therefore, the first issue raised by this appeal is whether, under the undisputed facts of this case, Chrysler Credit is an original creditor in this transaction or a "subsequent assignee" creditor. The district court correctly concluded that Chrysler Credit's status turned entirely upon the characterization of Clearview's role in this credit transaction. The

1. Section 131 of the Truth in Lending Act, 15 U.S.C. §1641, does not define "subsequent assignee" but does limit their liability in the following manner:

> Except as provided in section 1635(c) of this title and except in the case of actions brought under section 1649(d) of this title, in any action or proceeding by or against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to this subchapter shall be conclusive proof of the delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this part.

Act and Regulation Z define a "creditor" as one "who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit. . . ." Regulation Z, 226.2(s), 12 C.F.R. §226.2(s) (1976).[2] To "arrange for the extension of credit"

> means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit receives or will receive a fee, compensation, or other consideration for such service or has knowledge of the credit terms and participates in the preparation of the contract documents required in connection with the extension of credit.[3]

2. Formerly 12 C.F.R. §226.2(m) (1975); *see also,* Truth in Lending Act §103(f), 15 U.S.C. §1602(f) (1976).

3. 12 C.F.R. § 226.2(f) (1975). In late 1975, section 226.2 of Regulation Z was amended in the following pertinent manner:

> (h) "Arrange for the extension of credit" means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit
>
> (1) Receives or will receive a fee, compensation, or other consideration for such service, or
>
> (2) Has knowledge of the credit terms and participates in the preparation of the contract documents required in connection with the extension of credit.

As the appellant correctly states, these definitions increase the number of persons generally responsible for making truth-in-lending disclosures by categorizing as creditors additional persons, *i. e.*, credit arrangers, who do not fit the traditional definition of "creditor." Therefore, in some consumer credit transactions there are multiple "creditors," a credit arranger and a credit extender. Where there is a credit arranger there must obviously be a credit extender, and both are original creditors under the act and Regulation Z. Neither the Act nor Regulation Z define "subsequent assignee," but it is clear that an original creditor cannot be a subsequent assignee.

The district court found that both Clearview and Chrysler Credit were "creditors" in this transaction, and we agree to the extent that we view them as joint creditors, since there was in essence but one credit transaction; however, each is obligated to make the disclosures mandated by the Act and Regulations. It is undisputed that Clearview is in the business of selling automobiles and does not ordinarily finance credit sales itself. Instead, when the purchaser has not made financing arrangements of his own, Clearview takes a financial statement and submits it to several institutional creditors with whom it regularly deals for approval of the purchaser's credit. If any one of the lenders approves the customer's credit, Clearview completes the sale and immediately assigns the commercial papers to an approving lender. This practice of prearranging the assignment of commercial paper is a regular and essential part of Clearview's business and is, as the district court concluded, tantamount to arranging for the extension of credit. Meyers, *supra*, at 728. Consequently, in this factual setting, both appellants are "creditors" under the Act, Clearview as the credit arranger and Chrysler Credit as the credit extender.

Chrysler Credit argues, however, that additional undisputed facts support a conclusion that it is merely a "subsequent assignee" within the meaning of that term in section 1641 of the Act. Appellant insists that Clearview is the original creditor in this transaction, since at the moment the transaction was consummated Clearview was the holder of the note and chattel mortgage, and consequently the only one to whom appellee was obligated. However, appellant's argument elevates form over substance in an effort to avoid the realities of the credit transaction. Clearview never assumed any of the risks normally associated with the extension of credit in its dealings with appellee. By prearranging the assignment of the installment contract to Chrysler Credit, or any other institutional lender, Clearview merely arranged to sell the automobile for cash to be supplied by another. There is little doubt that in this transaction "credit," "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment,"[4] was extended by Chrysler Credit and arranged for by Clearview. See *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86 (8th Cir. 1976); *Starks v. Orleans Motors, Inc.*, 372 F.Supp. 928 (E.D. La.) *aff'd*, 500 F.2d 1182 (5th Cir. 1974).

II. *Finder's Fee Disclosure.*

[2] The "Vehicle Financing and Repurchase Plan" in effect between appellants is further evidence that Clearview is properly classified as a credit arranger in this transaction. Pursuant to this agreement Clearview received compensation for the services it rendered as a credit arranger in the form of a conditional rebate of a portion of the

4. Truth in Lending Act §103(e); 15 U.S.C. § 1602(e) (1970).

finance charge assessed against the purchase. The face value of the Meyers note assigned to Chrysler Credit was $4088.16, representing an unpaid principal balance of $3297.00 and a "Finance Charge" of $791.16. When Clearview sold the Meyers contract to Chrysler Credit, it received "an amount equal to the 'unpaid cash balance' of the contract," as per the above agreement, and an additional amount, $271.60, was set aside in a reserve account. Clearview's retention of the full amount in this account was contingent upon a number of factors, including the ability of Chrysler Credit to collect fully on the note. This $271.60 is clearly that "fee, compensation, or other consideration" received by the credit arranger for his services to the credit extender.[5]

The district court, however, characterized this $271.60 as a finder's fee, and found that it should have been disclosed as an element of the finance charge under sections 226.4(a)(3) and 226.8(c)(8)(i) of Regulation Z.

Section 226.8(c) of Regulation Z provides for the disclosures that must be made in the case of a credit sale, and subsection (8)(i) of that section requires the disclosure of "the total amount of the finance charge, with description of each amount included . . . ."

The phrase "amount of the finance charge" is defined in section 226.4(a) of Regulation Z as

> the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of

5. See 12 C.F.R. §226.2(h)(1) (1976); note 3 *supra*.

> the extension of credit, whether paid or payable by the customer, the seller, or any other person on behalf of the customer to the creditor or to a third party, including any of the following types of charges:
>
> (1) *Interest, time price differential, and any amount payable under a discount or other system of additional charges.*
>
> (2) Service, transaction, activity, or carrying charge.
>
> (3) *Loan fee, points, finder's fee, or similar charge.*
>
> (4) Fee for an appraisal, investigation, or credit report.
>
> . . . . [Emphasis added].[6]

Appellee characterizes the fee or rebate received by Clearview as a subsection (3) "finder's fee or similar charge" and thus an element of the finance charge that must be separately described under Regulation Z, §226.8(c)(8)(i). By definition, a "finder's fee" is the fee paid the person who initiates a business transaction between principals,[7] and section 226.4(a) makes such a fee includable in the amount of the finance charge only if it is "imposed directly or indirectly by the creditor *as an incident to or as a condition*

6. 12 C.F.R. §226.4(a) (1976); see Truth in Lending Act §106(a), 15 U.S.C. §1605(a) (1970).

7. See Webster's New World Dictionary, at 523 (2d ed. 1972).

of the extension of credit."[8] The district court found that the charge was indirectly borne by the purchaser, *Meyers, supra,* at 726 but did not find that it was *imposed* by the creditor as an incident to or as a condition of the extension of credit. It found instead that the rebate was designed to induce Clearview to sell its notes to Chrysler Credit, *id.*

Keeping in mind that the nomenclature of the regulation is tailored to familiar practices of those engaged in the business of extending credit, we resort to the doctrine, *noscitur a sociis,* for explication of the nature of the "finder's fee" to which the regulation is addressed. Both the "loan fee" (common to the small loan industry) and "points" (common to the real estate industry) are front end charges imposed by the creditor and payable by the customer. Clearly they directly affect the cost of credit. On the other hand, characterization of the compensation received by Clearview from Chrysler Credit as a "finder's fee" is alien to the rational meaning of the regulation. The lower court erred in holding that failure to disclose it resulted in a violation.[9] We reverse.

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8. *See* Federal Reserve Board Staff Opinion Letter of February 19, 1976, No. 1007, reproduced in 4 CCH Consumer Credit Guide, ¶ 31, 341, at p. 66,616 (1976). Letter No. 1007 provides in pertinent part that

> Subject to certain specified exceptions, any charge imposed by the creditor and payable by the customer as an incident to or a condition of the credit extension must be disclosed as part of the finance charge. All charges, including finder's fees, must be measured against this general definition in §226.4(a). The items mentioned in §§226.4(a)(1) through (8) provide examples of the types of charges which would normally come within this general rule.

9. *See Main v. Faller Ford, Inc.,* No. 74-337 (W.D. Pa., April 22, 1976).

[3] The district court alternatively held that appellant's disclosure statement violated section 226.8(c)(8)(i) for the additional reason that it failed to describe the single element of the finance charge, *i.e.,* precomputed interest. At the time of the district court's opinion there was some authority for this conclusion, *see Johnson v. Associates Finance, Inc.,* 369 F.Supp. 1121 (S.D. Ill. 1974);[10] however, a recent interpretation of section 226.8(c)(8)(i) by the Federal Reserve Board has resolved this matter in the appellant's favor. This interpretation found at section 226.820 of Regulation Z was published on December 1, 1975, and provides in pertinent part as follows:

> A description of the amounts included in the finance charge is necessary to carry out the purposes of the Act only when the total charge includes more than one element. Therefore, where only a single type of charge comprises the finance charge, disclosure of the total dollar amount of such charge, using the term "finance charge," complies with the requirements of §§226.8(c)(8)(i) and 226.8(d)(3), and there is no further requirement under those sections that the single type of charge be otherwise identified or described.[11]

This interpretation, the Federal Reserve Board's construction of its own Regulation Z,[12] is entitled to great deference

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10. *See also Ives v. W. T. Grant Co.,* 522 F.2d 749 (2d Cir. 1975).

11. 12 C.F.R. §226.820 (1976).

12. "Great deference is especially due the Federal Reserve Board's construction of its own Regulation Z because of the important interpretative and enforcement powers granted this agency by Congress under the Truth in Lending Act." *Bone v. Hibernia Bank,* 493 F.2d 135, 139 (9th Cir. 1974).

and it compels our reversal of the district court's alternative holding. *See, e.g., Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971, 976 (5th Cir. 1974).

III. *"Tag, Title and Fees" – "Documentary Service Fee" Disclosure.*

[4] The "Retail Buyer's Order" that was filled out by the salesman and signed by appellant at the time she agreed to purchase the car showed $3295.00 as the price of the car, a demonstrator with 8,680 miles. This price included a tune-up, clean-up and an extension of the new car warranty. To this price was added a $25.00 "Documentary Service Fee," $199.20 in sales taxes, and $15.00 for "Tag, Title & Fees" resulting in a "Total Cash Delivered Price" of $3534.20. In the disclosure statement appellants simply entered this "cash delivered price" as the "cash price" of the automobile. Appellee insisted below that this practice was in violation of Regulation Z,§§ 226.4(b) and 226.8(c)(4). The district court agreed. *Meyers, supra*, at 725. We affirm.

Regulation Z, § 226.8(c) sets forth the specific disclosures to be made in a credit sale transaction, and prescribes the manner in which such disclosures are to be made. That section provides, in pertinent part, as follows:

> In the case of a credit sale, in addition to the items required to be disclosed under paragraph (b) of this section, the following items, as applicable, shall be disclosed:
>
> (1) The cash price of the property or service purchased, using the term "cash price."
>
> (2) The amount of the downpayment itemized, as applicable, as downpayment in money, using the term "cash downpayment," downpayment in property, using the term "trade-in" and the sum, using the term "total downpayment."
>
> (3) The difference between the amounts described in subparagraphs (1) and (2) of this paragraph, using the term "unpaid balance of cash price."
>
> (4) All other charges, individually itemized, which are included in the amount financed but which are not part of the finance charge.
>
> (5) The sum of the amounts determined under subparagraphs (3) and (4) of this paragraph, using the term "unpaid balance."

. 13

"Cash price" is defined, for the purposes of this section as

> The price at which the creditor offers, in the ordinary course of business, to sell for cash the property or services which are the subject of a consumer credit transaction. It may include the cash price of accessories or services related to the sale such as delivery, installation, alterations, modifications, and improvements, and may include taxes to the extent imposed on the cash sale, *but shall not include any other charges of the types described in* §226.4.[14] [Emphasis added].

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13. 12 C.F.R. §226.8(c) (1976).

14. *Id.*, §226.2(n).

Appellants assert that they have fully complied with the mandates of §226.8(c), since the "cash price" disclosed was the price a purchaser for cash would pay for the car. However, the specific disclosure requirements of section 226.8(c) and 226.4(b) limit the definition of "cash price" to the price of the property, the automobile (accessories, delivery and installation charges included),[15] plus the sales tax thereon.[16] Section 226.4(b)(4) clearly requires the itemization and separate disclosure of the charge for "tag, title and fees."[17] *See*

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15. According to the "Retail Buyer's Order" the "cash price" of the car was $3295.00.

16. After the documentary service fee was added to the "cash price" of the car, and sales tax figured on that amount ($3320), appellee was charged a sales tax of $199.20.

17. *Id.*, §226.4(b)(4). That section states:

> If itemized and disclosed to the customer, any charges of the following types need not be included in the finance charge:
>
> . . . .
>
> (4) License, certificate of title, and registration fees imposed by law.

Section 226.4(b) was promulgated to implement the disclosure requirements of section 106(d) of the Truth in Lending Act, 15 U.S.C. §1605 (1970). That section provides:

> (d) If any of the following items is itemized and disclosed in accordance with the regulations of the Board in connection with any transaction, then the creditor need not include that item in the computation of the finance charged with respect to that transaction:
>
> (1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting or releasing or satisfying any security related to the credit transaction.

Starks v. Orleans Motors, Inc., 372 F.Supp. 928 (E.D.La.), *aff'd* 500 F.2d 1182 (5th Cir. 1974). Additionally, since the "Documentary Service Fee" was included in the amount financed, but was neither a fee for "service related to the sale" nor a part of the finance charge, it should have been separately disclosed pursuant to Regulation Z, §226.8(c)(4).[18] The failure to individually itemize these charges constituted a violation of the Truth in Lending Act.

(Footnote 17 continued from previous page).

> (2) The premium payable for any insurance in lieu of perfecting any security interest otherwise required by the creditor in connection with the transaction, if the premium does not exceed the fees and charges described in paragraph (1) which would otherwise be payable.
>
> (3) Taxes.
>
> (4) Any other type of charge which is not for credit and the exclusion of which from the finance charge is approved by the Board by regulation.

18. The following FRB staff opinion letter was brought to the court's attention by appellants in support of their argument that these charges need not be disclosed. However, upon close examination it clearly supports the conclusion reached above.

> "[This is on] the proper treatment under Regulation Z for certain charges assessed by an automobile dealer in connection with the sale of an automobile. The types of charges in question can be described in five different categories, as follows:
>
> "(1) a title application fee which the dealer collects as a designated agent of the State, a portion of which is forwarded to the State, with the dealer retaining a portion as his commission in accordance with State law;
>
> "(2) an inspection fee required by state law;
>
> "(3) a documentary and make-ready fee retained entirely by the dealer, which is intended to cover expenses incurred by the dealer in upkeep of the car prior to sale as well as fees for notarizing the various documents prepared in each transaction;

IV. *Acceleration Clause Disclosure.*

[5] On the reverse side of appellants' "Sale and Chattel Mortgage" form in paragraph 3 of the "Additional Terms and Conditions,"appeared an acceleration clause. While the disclosure statement portion of appellants' form properly informed the debtor that a delinquency or late charge would be imposed in the event of late payment, the disclosure statement failed to reveal the creditor's right to accelerate the debt in the event of default. The district court found that this omission violated Regulation Z, §226.8(b)(4) which requires the disclosure of "the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payment."

(Footnote 18 - continued from previous page)

"(4) State sales tax; and

"(5) a statutory fee of $2.50 for obtaining the release of lien when the indebtedness is paid.

"The first four categories of charges are assessed whether the transaction is for cash or is financed. The fifth category is assessed only when the transaction is financed. The question is whether the fees should be included in the 'cash price' or separately disclosed under 'other charges' under §226.8(c).

"Since charges (2), (3) and (4) are not imposed, as a condition of or incident to the extension of credit, and need not be itemized to be excludable from the finance charge under §226.4(b), they may be included in the cash price or *they may be included as 'other charges' (if financed).* However, in the case of charges (1) and (5), *such charges must be itemized, and disclosed to the customer under §226.4(b) in order that they may be excluded from the finance charge. If such charges are financed* (rather than being paid in cash), *they should be disclosed as 'other charges.'* " [emphasis added]. F.R.B. Letter No. 623 by G. Garwood, August 9, 1972, CCH CCG ¶ 30,872. See also F.R.B. Letter, by J. Kluckman, January 23, 1973, CCH CCG ¶ 30,935.

The district court's reasoning on this issue has been carefully examined and rejected by this panel in the recent case of *Martin v. Commercial Securities, Inc.*, slip opinion p. , F.2d (5th Cir. 1976). Consistent with that opinion, we reverse.

V. *Cross-appeal: Confession of Judgment Disclosure.*

[6] Appellee challenges on cross-appeal the district court's holding that the confession of judgment provision appearing only in the chattel mortgage was not a security interest which had to be described in the Disclosure Statement pursuant to Regulation Z, §§226.2(gg), 226.8(b)(5), and 226.202. The district court, relying upon a Staff Opinion Letter of the Federal Reserve Board dated February 28, 1974,[19] concluded that a Louisiana confession of

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19. In January, 1974, the FRB staff published Opinion Letter 748 stating that a Louisiana confession of judgment clause should be disclosed under Regulation Z, § 226.202. However, on February 28, 1974, the staff published Opinion Letter No. 759 reversing its prior position, stating:

> "Unfortunately, the original inquiry to which letter 748 was addressed did not elaborate in sufficient detail on the nature of a confession of judgment clause under Louisiana law so as to distinguish such clause from its customary characterization and usage in common law States. The inquiries referenced above have provided staff with sufficient information to indicate that a Louisiana confession of judgment clause is commonly used as a procedural device in conjunction with a mortgage on real or personal property to permit a creditor to avail himself of executory process. In such cases, the clause creates no security interest beyond that taken, and presumably disclosed under the mortgage.
>
> "Based upon these factors and our understanding that under Louisiana law a judgment executed before a default is void, we believe that a Louisiana confession of judgment need not be dis-

judgment clause, unlike a common law confession of judgment, gave the creditor no greater rights in the debtor's property than the "mortgage, lien and privilege" which was adequately disclosed, and therefore was not required to be disclosed as a "security interest." *See Meyers, supra*, 727-28. We adopt that portion of the district court's opinion which so thoroughly and skilfully treats this issue.

VI. *Cross-appeal: Computation of Damages.*

[7] The district court found Clearview and Chrysler Credit jointly and severally liable to the appellee for the sum of $1,000.00, the statutory maximum penalty, and a reasonable attorney's fee of $3,000.00. Appellee now asserts, however, that a recent amendment to the civil liability section of the Act, 15 U.S.C. § 1640, requires this court to assess the statutory penalty against each defendant in a case involving multiple creditors.[20] Section 1640(a) was amended to provide in pertinent part as follows:

(Footnote 19 continued from previous page)
closed as a security interest under the provisions of §226.8(b)(5) and and §226.202 of Regulation Z . . ."
F.R.B. Letter No. 759, by J. Kluckman, February 28, 1974, CCH Consumer Credit Guide ¶31,082.

20. Section 408(e) of the October 28, 1974, amendments, Pub.L. 93-495, Title IV, §408(e), 88 Stat. 1519, applies the new provisions to pending lawsuits which have not been finally decided. That section provides as follows:

> The amendments made by sections 406, 407, and 408 shall apply in determining the liability of any person under chapter 2 or 4 of the Truth in Lending Act, unless prior to the date of enactment of this Act such liability has been determined by final judgment of a court of competent jurisdiction and no further review of such judgment may be had by appeal or otherwise.

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this Act with respect to any person is liable to such person in an amount equal to the sum of --

> (1) any actual damage sustained by such person as a result of the failure;
>
> (2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; . . .[21]

Appellee finds support for her claim in the *"any creditor"* language of the Act. Similar language was used in the legislative history. However, the statutory reference to "any creditor" is not dispositive of whether Congress intended joint creditors to be separately liable under the Act.

Faced with a similar problem the Seventh Circuit Court

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21. Truth in Lending Act, §130(a), 15 U.S.C. §1640(a) (1976). At the time of entry of judgment in the case below section 130(a) provided:

> Except as otherwise provided in this section, any creditor who fails in connection with any consumer transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of
> (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and
> (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

of Appeals concluded in *Mirabal v. General Motors Acceptance Corporation*, 537 F.2d 871, 881 (7th Cir. 1976), that "it would seem harsh to impose separate penalties on both creditors for basically a single failure on their part." We must agree. Where, as here, one creditor has sold the other the consumer credit contract at issue, there has been but one "credit sale" giving rise to truth in lending violations. The appellants herein acted jointly in extending the credit and they were responsible for making a joint disclosure of the information required by the Act and Regulation Z.[22] Imposing separate liability on the joint creditors in this single consumer credit transaction does little to further the general purposes of the Act and is not mandated by practical considerations or the statutory language.[23] *See Starks v. Orleans Motors, Inc., supra*, at p. 933. We find appellee's plea for an extension of liability unconvincing and affirm the district court's award of statutory damages.

The judgment of the court below is affirmed in part, re-

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22. *See* Regulation Z, §§ 226.6(d), 226.8(a) & (c), 12 C.F.R. § § 226.6 (d), 226.8(a) & (c) (1976).

23. Strong evidence of a Congressional intent to limit a person's recovery to a single award of the statutory penalty is found in recently added subsection (g) of section 130, 15 U.S.C. § 1640(g). That subsection limits the creditor's liability for multiple failures to disclose, and states that

> The *multiple failure* to disclose to any person any information required under this part to be disclosed in connection with a single account under an open end consumer credit plan, other ***single consumer credit sale,*** consumer loan, or other extension of consumer credit, shall entitle the person to a single recovery under this section, but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries. [Emphasis added].

versed in part, and is remanded for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1303

D. C. Docket No. CA 73-963 "E"

CHERYL A. MEYERS,
Plaintiff-Appellee
Cross Appellant,
versus

CLEARVIEW DODGE SALES, INC.,
Defendant-Appellant
Cross-Appellee,
CHRYSLER CREDIT CORPORATION,
Defendant-Appellant

Appeals from the United States District Court for the
Eastern District of Louisiana

Before WISDOM and MORGAN, Circuit Judges, and
LYNNE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part, and that this cause be and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

September 27, 1976

Issued as Mandate:

APPENDIX C

PETITION FOR REHEARING - DENIED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-1303
Filed: Jan 3, 1977

CHERYL A. MEYERS,
Plaintiff-Appellee
Cross Appellant,

versus

CLEARVIEW DODGE SALES, INC.,
Defendant-Appellant
Cross-Appellee,
CHRYSLER CREDIT CORPORATION,
Defendant-Appellant

Appeals from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING
(January 3, 1977)

Before WISDOM and MORGAN, Circuit Judges, and
LYNNE, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed

on behalf of Chrysler Credit Corporation in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

S/ Seybourn H. Lynne
UNITED STATES DISTRICT JUDGE

APPENDIX D

OPINION OF DISTRICT COURT

Cheryl A. MEYERS
v.
CLEARVIEW DODGE SALES, INC., and
Chrysler Credit Corporation.

Civ. A. No. 73-963.

United States District Court, E.D. Louisiana
Oct. 31, 1974

Buyer of automobile on credit brought action against seller and finance company to recover statutory penalties and attorney's fees for alleged violations of Truth in Lending Act. On cross motions for summary judgment, the District Court, Heebe, Chief Judge, held that failure to either itemize the tag, title and registration charge on disclosure form or to include it in finance charge, and instead simply including such charge as part of cash price of the car, constituted a violation of Truth in Lending Act, that failure to individually itemize documentary service fee on disclosure statement, and instead merely including it in cash price of car, constituted a violation of the Act, that Louisiana confession of judgment, which appeared only in chattel mortgage, was not a "security interest" which had to be described in disclosure statement, that seller was liable for violations of Truth in Lending Act as a creditor, that finance company would be considered a "creditor" within Truth in Lending Act, and that buyer was entitled to recover $3,000 as a reasonable attorney's fee.

Plaintiff's motion granted and defendants' motions denied.

1. Pawnbrokers and Money Lenders
6.4, 6.8

Where "Retail Buyer's Order" showed that a $15 charge, purportedly covering "tag, title and fees," was added to price of car purchased on credit, failure to either itemize the tag, title and registration charge on disclosure form or to include it in finance charge, and instead simply including such charge as part of cash price of the car, constituted a violation of Truth in Lending Act. Truth in Lending Act, §102 et seq., 15 U.S.C.A. §1601 et seq.

2. Pawnbrokers and Money Lenders 6.8

Where "Retail Buyer's Order" indicated that a $25 "Documentary Service Fee" was added to price of car purchased on credit, failure to individually itemize this fee on disclosure statement, and instead merely including it in cash price of car, constituted a violation of Truth in Lending Act. Truth in Lending Act, §102 et seq., 15 U.S.C.A. §1601 et seq.

3. Pawnbrokers and Money Lenders 6.8

Where vehicle financing and repurchase plan required that finance company put a certain percentage of finance charge into a reserve account for seller of automobile on credit when finance company purchased buyer's note, such rebate constituted either a finder's fee or a similar charge which had to be separately described in disclosure form, and in any event even if a finder's fee was not involved and

entire finance charge was composed of precomputed interest, the disclosure statement, which did not describe finance charge as being entirely composed of interest, was defective under Truth in Lending Act. Truth in Lending Act, §102 et seq., 15 U.S.C.A. §1601 et seq.

4. Pawnbrokers and Money Lenders 2

Purpose behind Truth in Lending Act is to inform consumer not only of true cost of credit, but also of nature of items of credit offered to him, which includes a description of the components of the finance charge. Truth in Lending Act, §102 et seq., 15 U.S.C.A. §1601 et seq.

5. Pawnbrokers and Money Lenders 6.8

Disclosure statement, which informed buyer of automobile on credit that a delinquency charge might be imposed in event of a late payment but failed to mention acceleration clause contained in note, was in violation of regulation promulgated under Truth in Lending Act, requiring disclosure of the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in event of late payments. Truth in Lending Act, § 102 et seq., 15 U.S.C.A. § 1601 et seq.

6. Pawnbrokers and Money Lenders 2

Truth in Lending Act is remedial in nature and in order that its important goal of providing consumers with much needed credit information be furthered, its terms should be construed liberally. Truth in Lending Act, §102 et seq., 15 U.S.C.A. §1601 et seq.

7. Pawnbrokers and Money Lenders 6.4

Word "charge," in regulation, promulgated under Truth in Lending Act, requiring disclosure of amount, or method, of computing the amount, of any default, delinquency, or similar charges payable in event of late payments, can mean any pecuniary burden, expense or obligation. Truth in Lending Act, § 102 et seq., 15 U.S.C.A. § 1601 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

8. Pawnbrokers and Money Lenders 6.8

Where lender of money for purchase of car used a one-page combination form that was divided into three sections by heavy blue lines, where section compromising top one-fifth of page was entitled "Chattel Mortgage," section compromising bottom one-fifth of page was entitled "Promissory Note," and large section in middle was entitled "Disclosure Statement," and where acceleration clause was contained in "Promissory Note" but not in the "Disclosure Statement" section, such arrangement did not satisfy requirements of Truth in Lending Act, in view of regulation, promulgated by Federal Reserve Board pursuant to its broad grant of authority, requiring that all of disclosures be made together. Truth in Lending Act, §128 (b), 15 U.S.C.A. §1638(b).

9. Pawnbrokers and Money Lenders 6.8

Louisiana confession of judgment, which appeared only in chattel mortgage, was not a "security interest" which had to be described in disclosure statement made in connection

with loan for purchase of automobile. Truth in Lending Act, §102 et seq., 15 U.S.C.A. §1601 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

10. Pawnbrokers and Money Lenders 6.1

Seller of automobile on credit, who initially extended credit to buyer as was evidenced by subsequent assignment of contract to finance company, and who regularly arranged for such assignments to finance company and other lenders, was liable for violations of Truth in Lending Act as a creditor. Truth in Lending Act, § 103(f), 15 U.S.C.A.§1602(f).

11. Pawnbrokers and Money Lenders 6.1

In construing the Truth in Lending Act, designed to protect consumers, courts must focus on the substance of a transaction rather than its mere form. Truth in Lending Act, §102 et seq., 15 U.S.C.A. §1601 et seq.

12. Pawnbrokers and Money Lenders 6.1

Where buyer of automobile on credit, seller, and finance company were fully aware at time of purchase that finance company was true creditor, where forms used by seller were prepared by finance company, and where it was necessary for seller to obtain credit approval for buyer from finance company or one of other lenders with whom it regularly dealt before agreeing to the sale, finance company would be considered a "creditor" within Truth in Lending Act, notwithstanding its claim that it was merely a subsequent assignee of buyer's note. Truth in Lending Act, §131, 15

U.S.C.A. §1641.

See publication Words and Phrases for other judicial constructions and definitions.

13. Pawnbrokers and Money Lenders 10

Buyer of automobile on credit, who established violations of Truth in Lending Act in connection with transaction that involved a finance charge of $791.16, was not entitled to multiply her statutory maximum penalty of $1,000 by either the number of defendants or the number of payments she had to make under note. Truth in Lending Act, §102 et seq., 15 U.S.C.A. §1601 et seq.

14. Pawnbrokers and Money Lenders 6.9

Buyer of automobile on credit, who established violations of Truth in Lending Act, was entitled to recover $3,000 as a reasonable attorney's fee. Truth in Lending Act, §102 et seq., 15 U.S.C.A. § 1601 et seq.

. . . . . .

Patrick D. Breeden, Russell & DeRussy, New Orleans, La., for plaintiff.

James K. Irvin, Milling, Benson, Woodward, Hillyer & Pierson, New Orleans, La., for defendant Chrysler Credit Corp.

Robert E. McDonald, Dupepe & McDonald, Metairie, La., for defendant Clearview Dodge Sales, Inc.

HEEBE, Chief Judge:

This action was brought by the plaintiff against Clearview Dodge Sales, Inc., and Chrysler Credit Corporation to recover statutory penalties and attorney's fees for alleged violations of the Truth-in-Lending Act, 15 U.S.C. §1601 et seq., and Regulation Z, 12 C.F.R. § 226.1, et seq. The case is now before the Court on cross motions for summary judgment.

THE FACTS

In June of 1972 the plaintiff, Cheryl Meyers, decided that she wished to purchase a 1972 Dodge from Clearview Dodge Sales, Inc., on credit. A "Retail Buyer's Order" which described the car, its sales price and the credit terms was filled out by the salesman and signed by Meyers. The sale was not finalized, however, at this point of the transaction. Since Clearview does not itself finance credit sales, it had to obtain credit approval for Meyers from one of the four or five lenders with which it regularly deals. In this case, Chrysler Credit Corporation agreed to finance Meyer's purchase. The information from the buyer's order was then fed into a machine which typed out and prepared a combination contract, disclosure statement, chattel mortgage and promissory note on a form prepared by Chrysler Credit Corporation. According to this document, Clearview appears as the seller and mortgagee of the car. However, the paper was then sold to Chrysler Credit Corporation at a discount, according to the terms of the "Vehicle Financing and Repurchase Plan" in effect between Clearview and Chrysler Credit.

Plaintiff contends that five disclosures mandated by the

Truth-in-Lending Act and its companion, Regulation Z, were not made and that both defendants are liable to her for her statutory penalties and attorney's fees.

TAG, TITLE AND FEES

[1] The "Retail Buyer's Order" shows that a $15.00 charge, purportedly covering "tag, title and fees," was added to the price of the car. However, on the disclosure statement this charge was neither itemized nor included as a component of the finance charge; instead, it was simply included as part of the cash price of the car. Defendants point to Reg. Z, 12 C.F.R. § 226.4(a), and argue that since all purchasers must pay this charge, regardless of whether the sale is for cash or credit, it is not a charge imposed "as an incident to or as a condition of the extension of credit" and, hence, need not be included in the finance charge. However, §226.4(b) specifically states that "If itemized and disclosed to the customer," license, certificate of title and registration fees need not be included in the finance charge. As the court concluded in Starks v. Orleans Motors, 372 F. Supp. 928 (E.D. La. 1974), "The options are clear; nowhere is there allowance for inclusion within the cash price." Inasmuch as this district court decision was recently affirmed by the Fifth Circuit, Starks v. Orleans Motors, 500 F.2d 1182 (1974), it is clear that the failure to either itemize the tag, title and registration charge on the disclosure form or to include it in the finance charge violates the Truth-in-Lending Act.

DOCUMENTARY SERVICE FEE

[2] The "Retail Buyer's Order" also indicates that a $25.00 "Documentary Service Fee" was added to the price

of the car. This charge was treated on the disclosure statement in the same fashion as the "tag, title and fees" charge. Instead of being separately itemized, it was merely included in the cash price of the car. Defendants again argue that this "fee" is imposed upon all buyers; since it, therefore, has no bearing upon the extension of credit, it need not be disclosed. This argument, however, fails to come to grips with the clear requirements of Regulation Z. Section 226.8(c)(4) states that in the case of a credit sale "all other charges, individually itemized which are included in the amount financed but which are not part of the finance charge" must be disclosed on the disclosure statement. The sale in question was a credit sale; the "Documentary Service Fee" was included in the amount financed and was not part of the finance charge. Thus, the failure to individually itemize this fee on the disclosure statement constitutes a violation of the Truth-in-Lending Act.

FINDER'S FEE

[3] According to the disclosure statement, the total amount of the finance charge was $791.16. The Vehicle Financing and Repurchase Plan required that Chrysler Credit put a certain percentage of that charge, amounting to $271.60, into a reserve account for Clearview when it purchased Meyers' note. Clearview's retention of that full amount according to the plan, is contingent upon a number of factors, including the ability of Chrysler Credit to collect fully on the note. Naturally, this contractual relationship provides Clearview with an incentive to allow Chrysler Credit to finance its car sales, and we do not quarrel with plaintiff's characterization of it as a kind of rebate or finder's fee. As such, Regulation Z required that it be separately described on the disclosure form. 12 C.F.R. 226.8(c)(8)

(i) requires that "the total amount of the finance charge, with description of each amount included . . ." must be disclosed. 12 C.F.R. 226.4(a)(3) further provides that a "Loan fee, points, finder's fee, or similar charge" be included in the calculation of the amount of the finance charge. The defendant strenuously argues that the finance charge consisted solely of precomputed interest and that since the "rebate" was not a separate, additional charge adding to Meyers' financial burden, it cannot be characterized as a "finder's fee."

[4] First, the rebate surely qualifies as either a finder's fee or a similar charge, inasmuch as it is a charge borne ultimately by the purchaser as an incident to the extension of credit which is designed to induce Clearview to sell its notes to Chrysler Credit, the creditor. Regulation Z requires that each amount included in the finance charge be separately described precisely so that lenders cannot through precomputation, disguise such charges by including them in the calculation of "precomputed interest." The defendants argue at length that the disclosure of the "finder's fee" is not necessary since the failure to disclose in no way mislead the plaintiff as to the amount of the finance charge or the annual percentage rate. The simple answer to this contention is that the purpose behind the Truth-in-Lending Act is to inform the consumer not only of the true cost of credit, but also of the nature of the terms of credit offered to him, which certainly includes a description of the components of the finance charge.

Even if we were to agree with the defendants that a finder's fee was not involved in this transaction, and that the entire finance charge was composed of precomputed interest, we would, nevertheless, find the disclosure state-

ment defective. If the finance charge was entirely composed of interest, then the consumer is entitled to know that fact under 226.8(c)(8)(i). *See*, Johnson v. Associates Finance, Inc., 369 F.Supp. 1121 (S.D. Ill. 1974). The disclosure statement contains no such description under the heading "finance charge."

ACCELERATION CLAUSE

[5] The disclosure statement properly informs the debtor that a delinquency charge may be imposed in the event of a late payment but fails to mention the acceleration clause contained in the promissory note. Thus, by relying upon the disclosure form, the consumer would understand that he might have to pay a small delinquency charge in the event of a late payment but would not be aware that at the creditor's option the entire balance of the debt could be accelerated. The plaintiff contends that this omission violates Regulation Z, § 226.8(b)(4), which requires the disclosure of "the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments."

Defendant argues, first, that the acceleration clause may only be triggered by the debtor's default which would constitute a "subsequent occurrence" under 226.6(g). Under that section, the defendants argue that the possibility of acceleration need not have been disclosed since its happening would be contingent upon postdisclosure events or acts. This reading of the regulation would, however, render §226.8(b)(4) a nullity, since all delinquency-type charges are contingent upon such postdisclosure acts, namely, the failure to make timely payments.

[6, 7] Secondly, the defendants maintain that an acceleration clause does not constitute a "charge" under § 226.8 (b)(4). This argument is grounded in a belief that §226.8 (b)(4) requires disclosure only of "default, delinquency, or similar charges" which result in the increase of the consumer's total financial obligation and that since Louisiana law provides for a rebate of interest in the event of acceleration, the acceleration clause need not be disclosed. However, the Truth-in-Lending Act is remedial in nature and in order that its important goal of providing consumers with much needed credit information be furthered, we must construe its terms liberally. Thomas v. Myers-Dickson Furniture Company, 479 F.2d 740 (5th Cir. 1973). We agree with the decision in Garza v. Chicago Health Clubs, Inc., 347 F.Supp. 955 (N.D.Ill. 1972), that the word "charge" can mean any pecuniary burden, expense or obligation. The acceleration of the balance of the debt against one who is late with a payment certainly results in a considerable immediate pecuniary burden for one attempting to avoid foreclosure. The Truth-in-Lending Act was intended to require the disclosure of exactly this type of credit information. *See*, Garza v. Chicago Health Clubs, Inc. *supra*; Johnson v. McCrackin-Sturman Ford, CCH Consumer Credit Guide, 381 F.Supp. 153 (W.D. Pa., 1974); Pollock v. Avco Financial Services, Inc., CCH Consumer Credit Guide, Para. 98,766 (N.D. Ga., July 1, 1974); Barksdale v. Peoples Financial Corp. of Alpharetta, CCH Consumer Credit Guide, Para. 98,738 (N.D. Ga., September 5, 1974).

[8] Finally, the defendants argue that the acceleration clause was properly disclosed on Chrysler Credit Corporation's combination Chattel Mortgage, Disclosure Statement and Promissory Note form used in this transaction. This standard form is a one-page document, the face of which is

divided into three sections by heavy blue lines. The section comprising the top one-fifth of the page is entitled "Chattel Mortgage," the section comprising the bottom one-fifth of the page is entitled "Promissory Note," and the large section in the middle is labeled "Disclosure Statement." The acceleration clause is contained in the "Promissory Note" but not in the "Disclosure Statement" section. The defendant claims that this arrangement satisfies the requirements of 15 U.S.C. § 1638(b) which requires that the requisite disclosures be made "before the credit is extended, and may be made by disclosing the information in the contract or other evidence of indebtedness to be signed by the purchaser." This provision, however, has been clarified by §226.8(a) of Regulation Z, which of course, was promulgated by the Federal Reserve Board pursuant to its broad grant of authority. Mourning v. Family Publications Service,Inc., 411 U.S.356 93 S.Ct. 1652, 36 L.Ed. 2d 318 (1973). Section 226.8(a) clearly states that "All of the disclosures shall be made together . . ." It would seem to be elementary that where a combination form such as the one here at issue contains a separate section entitled "Disclosure Statement," all the disclosures must be placed in that section to be considered having been made together. The result otherwise would tend to be confusing and misleading for the customer and, hence, at odds with the declared purposes of the Act.

CONFESSION OF JUDGMENT

[9] Regulation Z, §226.8(b)(5), requires a description of any "security interests" held,retained or acquired by the creditor. "Security interest" is defined by Regulation Z, §226.2(z) as "any interest in property which secures payment or performance of an obligation" including "consensual or confessed liens whether or not recorded." Plaintiff contends that the confession of judgment, which appears

only in the Chattel Mortgage, is a security interest which had to be described in the Disclosure Statement. We agree with the defendants and the Federal Reserve Board that a Louisiana confession of judgment is not such an interest.

The Board's interpretation, §226.202, reads, in pertinent part, as follows:

> "(b) In some of the States, confession of judgment clauses or cognovit provisions are lawful and make it possible for the holder of an obligation containing such clause or provision to record a lien on property of the obligor simply by recordation entry of judgment; the obligor is afforded no opportunity to enter a defense against such action prior to entry of the judgment.
>
> "(c) Since confession of judgment clauses and cognovit provisions in such States have the effect of depriving the obligor of the right to be notified of a pending action and to enter a defense in a judicial proceeding before judgment may be entered or recorded against him, such clauses and provisions in those States are security interests under § 226.2(z), and for the purposes of §§ 226.7 (a)(7), 226.8(b)(5), and 226.9. This is the case even if the judgment cannot be entered until after a default by the obligor."

The latest pronouncement by the Board concerning the application of Regulation Z, §226.2(z), to a Louisiana confession of judgment is contained in its Public Position Letter #759 of February 28,1974, which concludes:

> ". . . a Louisiana confession of judgment clause is commonly used as a procedural device in conjunction with a mortgage on real or personal property to permit a creditor to avail himself of executory process. In

such cases, the clause creates no security interest beyond that taken, and presumably disclosed under the mortgage.

"Based upon these factors and our understanding that under Louisiana law a judgment executed before default is void, we believe that a Louisiana confession of judgment need not be disclosed as a security interest under the provisions of §226.8(b)(5) and §226.202 of Regulation Z."

We have no quarrel with the Board's assessment of the effect of a Louisiana confession of judgment and its conclusion that in Louisiana confession of judgment is merely a procedural device which itself creates no security interest. *See,* Ross v. Brown Title Corp., 356 F.Supp, 595 (E.D.La. 1973), aff'd 412 U.S. 934, 93 S.Ct. 2788, 37 L.Ed. 2d 394 (1973). We note, further, that the Disclosure Statement does reveal that the "seller shall have a mortgage, lien and privilege in the property . . ." This is all that the law requires to be disclosed; the lender need not "give the consumer a short course in commercial transactions."

WHO IS LIABLE?

[10] Plaintiff asserts that both Clearview and Chrysler Credit Corporation are liable as "creditors" under the Act. The Act and Regulation Z define a "creditor" as one who regularly extends or arranges for the extension of credit, for which a finance charge is required, in connection with sales or loans to consumers. 15 U.S.C. §1602(f) and Regulation Z, §226.2(k) and (m). It is clear that Clearview is liable as a creditor under both definitions. It initially extended credit to the plaintiff as is evidenced by the sub-

sequent assignment of the contract to Chrysler Credit. Furthermore, by regularly arranging for such assignments to Chrysler Credit and other lenders, which practice is absolutely essential to Clearview's selling cars on credit, Clearview is in actuality arranging for the extension of credit, which it did for plaintiff Meyers.

[11, 12] Chrysler Credit strenuously argues that it is merely a "subsequent assignee" of the plaintiff's note and, as such, entitled to the limited protection of 15 U.S.C. §1641. Several courts have relied upon a "conduit" theory to reject Chrysler Credit's argument. Under the "conduit" theory, a finance company such as Chrysler Credit will be considered a creditor "when the seller merely serves as a 'conduit' for placing the finance companies' contracts with consumers and then regularly assigns the contracts to the finance companies." Philbeck v. Timmers Chevrolet, Inc., 361 F.Supp. 1255, 1260 (N.D.Ga. 1973), rev'd on other grounds, 499 F.2d 971 (5th Cir. 1974); Garza v. Chicago Health Club, *supra;* Starks v. Orleans Motors, Inc. *supra;* Owens v. Modern Loan Co., CCH Consumer Credit Guide, Para. 99,099 (W.D. Ky. 1972). In construing a piece of remedial legislation such as the Truth-in-Lending Act, designed to protect consumers, courts must focus on the substance of a transaction rather than its mere form. The "conduit" theory seeks to accomplish just that. All three parties to this transaction were fully aware at the time of the purchase that Chrysler Credit was the true creditor. The forms used by Clearview were prepared by Chrysler Credit. Further, it was necessary for Clearview to obtain credit approval for the plaintiff from Chrysler Credit or one of the other lenders with whom it regularly dealt before agreeing to the sale. In such a situation, where the seller works so closely with the finance company, the latter must be con-

sidered a "creditor" within the definition of the Act.

STATUTORY DAMAGES AND ATTORNEY'S FEES

[13] The statutory damages for a violation of the Truth-in-Lending Act are computed by doubling the amount of the finance charge imposed in connection with the transaction. The Act further provides for a minimum recovery of $100.00 and a maximum recovery of $1,000.00. Twice the finance charge imposed in this transaction is well over the statutory maximum. Accordingly, the Court finds Clearview and Chrysler Credit Corporation jointly and severally liable to the plaintiff for the sum of $1,000.00. We reject plaintiff's attempts to rewrite the Act so as to reap a larger recovery. We find nothing in the Act to support plaintiff's argument that she is entitled to multiply her statutory maximum penalty by either the number of defendants or the number of payments she must make under the note. Such an interpretation of the Act would produce windfalls for consumers who do not even have to prove any real damages in order to recover.

[14] Plaintiff is also entitled to recover the costs of this action together with a reasonable attorney's fee. In determining the amount of the fee in this case, we have referred to the factors outlined by the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), a Title VII case. We are further aware of the time and effort expended by plaintiff's counsel, much of which was occasioned by the defendants' strenuous and able defense. Considering all of these factors, plaintiff is entitled to recover the sum of $3,000.00 as a reasonable attorney's fee.

The plaintiff's motion for summary judgment is granted. The defendants' motions for summary judgment are denied.

Let judgment be entered accordingly.

APPENDIX E

JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: NOV 6, 1974

CHERYL A. MEYERS	CIVIL ACTION
VERSUS	NO. 73-963
CLEARVIEW DODGE SALES, INC., and CHRYSLER CREDIT CORPORATION	SECTION "B"

JUDGMENT

This cause came on for hearing on a former day on motion of plaintiff for summary judgment, and the Court having Granted same; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Cheryl A. Meyers and against the defendants, Clearview Dodge Sales, Inc. and Chrysler Credit Corporation in the sum of $1,000.00 together with $3,000.00 for attorney's fees, and for all costs.

Dated at New Orleans, Louisiana on this 6th day of

November 1974.

s/ Frederick J.R. Heebe
UNITED STATES DISTRICT JUDGE

Patrick D. Breeden, Esq.
James K. Irwin, Esq.
Robert E. McDonald, Esq.

Date of Entry Nov 7 1974

APPENDIX F

PERTINENT PROVISIONS OF THE TRUTH IN LENDING ACT, 15 U.S.C. 1601 *et seq.*

Section 1602. Definitions and Rules of Construction

* * * * *

(f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this subchapter apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

* * * * *

Section 1614. Liability of assignees.

Except as otherwise specifically provided in this subchapter, any civil action for a violation of this subchapter which may be brought against the original creditor in any credit transaction may be maintained against any subsequent assignee of the original creditor where the violation from which the alleged liability arose is apparent on the face of the instrument assigned unless the assignment is involuntary.

* * * * *

Section 1638. Sales not under open end credit plans -- Required disclosures by creditor.

(a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:

(1) The cash price of the property or service purchased.

(2) The sum of any amounts credited as downpayment (including any trade-in).

(3) The difference between the amount referred to in paragraph (1) and the amount referred to in paragraph (2).

(4) All other charges, individually itemized, which are included in the amount of the credit extended but which are not part of the finance charge.

(5) The total amount to be financed (the sum of the amount described in paragraph (3) plus the amount described in paragraph (4)).

(6) Except in the case of a sale of a dwelling, the amount of the finance charge, which may in whole or in part be designated as a time-price differential or any similar term to the extent applicable.

(7) The finance charge expressed as an annual percentage rate except in the case of a finance charge

(A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide a consumer credit sale into two or more sales to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(8) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness.

(9) The default, delinquency, or similar charges payable in the event of late payments.

(10) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

(b) Except as otherwise provided in this part, the disclosures required under subsection (a) of this section shall be made before the credit is extended, and may be made by disclosing the information in the contract or other evidence of indebtedness to be signed by the purchaser.

* * * * *

Section 1640. Civil Liability.

* * * * *

(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

* * * * *

Section 1641. Written acknowledgment as proof of receipt.

Except as provided in section 1635(c) of this title and except in the case of actions brought under section 1640(d) of this title, in any action or proceeding by or against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to this subchapter shall be conclusive proof of the delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this part. This section does not affect the rights of the obligor in any action against the original creditor.

APPENDIX G

PERTINENT PROVISIONS OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM'S REGULATION Z, 12 C.F.R. PART 226

Section 226.2. Definitions and rules of construction

* * * * *

(h) "Arrange for the extension of credit" means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit.

(1) Receives or will receive a fee, compensation, or other consideration for such service, or

(2) Has knowledge of the credit terms and participates in the preparation of the contract documents required in connection with the extension of credit.

It does not include honoring a credit card or similar device where no finance charge is imposed at the time of that transaction.

* * * * *

(n) "Cash price" means the price at which the creditor offers, in the ordinary course of business, to sell for cash the property or services which are the subject of a consumer credit transaction. It may include the cash price of accessories or services related to the sale such as delivery, installa-

tion, alterations, modifications, and improvements, and may include taxes to the extent imposed on the cash sale, but shall not include any other charges of the types described in §226.4.

* * * * *

(q) "Credit" means the right granted by a creditor to a customer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor. . . .

* * * * *

(s) "Creditor" means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit, which is payable by agreement in more than four instalments, or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise. . . .

* * * * *

Section 226.4 Determination of Finance charge.

* * * * *

(b) *Itemized charges excludable.* If itemized and disclosed to the customer, any charges of the following types need not be included in the finance charge:

(1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the

existence of or for perfecting or releasing or satisfying any security related to the credit transaction.

(2) The premium payable for any insurance in lieu of perfecting any security interest otherwise required by the creditor in connection with the transaction, if the premium does not exceed the fees and charges described in subparagraph (1) of this paragraph which would otherwise be payable.

(3) Taxes not included in the cash price.

(4) License, certificate of title, and registration fees imposed by law.

* * * * *

Section 226.6. General disclosure requirements

* * * * *

(d) *Multiple creditors; joint disclosure.* If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and the purview of his relationship with the customer. If two or more creditors make a joint disclosure, each creditor shall be clearly identified. The disclosures required under paragraphs (b) and (c) of §226.8 shall be made by the seller if he extends or arranges for the extension of credit. Otherwise disclosures shall be made as required under paragraphs (b) and (d) of §226.8.

* * * * *

Section 226.8. Credit other than open end – specific disclosures

(a) *General rule.* Any creditor when extending credit other than open end credit shall, in accordance with §226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. Except as otherwise provided in this section, such disclosures shall be made before the transaction is consummated. At the time disclosures are made, the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made and on which the creditor is identified. Except as provided in paragraph (r) of this section, all of the disclosures shall be made together on either:

(1) The note or other instrument evidencing the obligation on the same side of the page and above the place for the customer's signature; or

(2) One side of a separate statement which identifies the transaction.

(b) *Disclosures in sale and nonsale credit.* In any transaction subject to this section, the following items, as applicable, shall be disclosed:

(1) The date on which the finance charge begins to accrue if different from the date of the transaction.

(2) The finance charge expressed as an annual percentage rate, using the term "annual percentage rate," except in the case of a finance charge.

(i) Which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(ii) Which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide an extension of credit into two or more transactions to avoid the disclosure of an annual percentage rate, nor may any other percentage rate be disclosed if none is stated in reliance upon subdivision (i) or (ii) of this subparagraph.

(3) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness and, except in the case of a loan secured by a first lien or equivalent security interest on a dwelling made to finance the purchase of that dwelling and except in the case of a sale of a dwelling, the sum of such payments using the term, "total of payments."[10] If any payment is more than twice the amount of an otherwise regularly scheduled equal payment, the creditor shall identify the amount of such payment by the term "balloon payment" and shall state the conditions, if any, under which that payment may be refinanced if not paid when due.

(4) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments.

(5) A description or identification of the type of any

---

10. The disclosures required by this sentence need not be made with respect to interim student loans made pursuant to federally insured student loan programs under Pub. L. 89-329, Title IV Part B of the Higher Education Act of 1965, as amended.

security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify. In any such case where a clear identification of such property cannot properly be made on the disclosure statement due to the length of such identification, the note, other instrument evidencing the obligation, or separate disclosure statement shall contain reference to a separate pledge agreement, or a financing statement, mortgage, deed of trust, or similar document evidencing the security interest, a copy of which shall be furnished to the customer by the creditor as promptly as practicable. If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

(6) A description of any penalty charge that may be imposed by the creditor or his assignee for prepayment of the principal of the obligation (such as a real estate mortgage) with an explanation of the method of computation of such penalty and the conditions under which it may be imposed.

(7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deduct-

ed from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed.

(c) *Credit sales.* In the case of a credit sale, in addition to the items required to be disclosed under paragraph (b) of this section, the following items, as applicable, shall be disclosed:

(1) The cash price of the property or service purchased, using the term "cash price."

(2) The amount of the downpayment itemized as applicable, as downpayment in money, using the term "cash downpayment," downpayment in property, using the term "trade-in" and the sum, using the term "total downpayment."

(3) The difference between the amounts described in subparagraphs (1) and (2) of this paragraph, using the term "unpaid balance of cash price."

(4) All other charges, individually itemized, which are included in the amount financed but which are not part of the finance charge.

(5) The sum of the amounts determined under subparagraphs (3) and (4) of this paragraph, using the term "unpaid balance."

(6) Any amounts required to be deducted under paragraph (e) of this section using, as applicable, the terms

"prepaid finance charge" and "required deposit balance," and, if both are applicable, the total of such items using the term "total prepaid finance charge and required deposit balance."

(7) The difference between the amounts determined under subparagraphs (5) and (6) of this paragraph, using the term "amount financed."

(8) Except in the case of a sale of a dwelling:

(i) The total amount of the finance charge, with description of each amount included, using the term "finance charge," and

(ii) The sum of the amounts determined under subparagrphs (1), (4), and (8) (i) of this paragraph, using the term "deferred payment price."

(d) *Loans and other nonsale credit.* In the case of a loan or extension of credit which is not a credit sale, in addition to the items required to be disclosed under paragraph (b) of this section, the following items, as applicable, shall be disclosed:

(1) The amount of credit, excluding items set forth in paragraph (e) of this section, which will be paid to the customer or for his account or to another person on his behalf, including all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge, using the term "amount financed."

(2) Any amount referred to in paragraph (e) of this

section required to be excluded from the amount in subparagraph (1) of this paragraph, using, as applicable, the terms "prepaid finance charge" and "required deposit balance," and, if both are applicable, the total of such items using the term, "total prepaid finance charge and required deposit balance."

(3) Except in the case of a loan secured by a first lien or equivalent security interest on a dwelling and made to finance the purchase of that dwelling, the total amount of the finance charge, with description of each amount included, using the term "finance charge."

84-291-5163 (12/71) Louisiana

SALE AND CHATTEL MORTGAGE

No.

Buyer's (Mortgagor's) and Co-Buyer's Name and Address	Seller's (Mortgagee's) Name and Address
Cheryl Meyers 316 33nd St. N. O. La.	Clearview Dodge Sales, Inc. 4848 Veterans Blvd. Metairie, La.

The undersigned Seller (mortgagee) hereby sells, and the undersigned Buyer (which means Buyer (mortgagor) or Buyers (mortgagors), jointly and severally), having been quoted both a time price and a lower cash price, hereby purchases from Seller on a time price basis, subject to the terms and conditions set forth herein, including the reverse hereof (which are incorporated herein by reference), the below described motor vehicle(s) (hereinafter called "property"), delivery and acceptance of which in good order hereby are acknowledged by Buyer. In order to secure payment of said Total of Payments and the promissory note executed herewith and any other indebtedness which now exists or may hereafter accrue from Buyer to Seller and assigns pursuant hereto, not to exceed a maximum amount of 50% of the original principal of the said note (without this mortgage being a waiver by Seller of the vendor's lien and privilege which are hereby expressly reserved), Buyer does hereby specially mortgage, affect and hypothecate the property to the Seller and assigns forever, the property to remain so mortgaged and hypothecated until all amounts due hereunder, and under said note, are fully paid in cash. Seller may cause the property to be seized and sold under executory or other legal process should such action be required pursuant to the conditions under this mortgage, in the manner provided by applicable law. Buyer binds himself not to alienate the property to the prejudice of this mortgage and hereby confesses judgement in favor of Seller or any subsequent holder of said note for the principal, delinquency and collection charges, interest if any, attorney's fees, taxes, assessments, license fees and all other expenses, charges and costs to the extent permitted by applicable law. Buyer hereby expressly waives the benefit of appraisement and all laws conferring the same, and expressly waives the issuance of the notice and demand for payment provided by Article 2639 and the delays prescribed by Article 2331 of the Louisiana Code of Civil Procedure or any other laws pertaining thereto, Buyer hereby expressly agreeing to the immediate seizure of said property in the event of suit herein. The property will be located in the Parish of _____, State of Louisiana

	Year	Make	Cyl	Model	Body Style	Vehicle No
☐ NEW ☒ USED	1972	Dodge	8	Swinger	2 Dr.	LH23G2R138710

CHECK ALL SPEC EQUIP	☐ RADIO	☐ HEATER	☐ AUTO TRANS	☐ POWER STEERING	☐ POWER BRAKES	☐ POWER WINDOWS	☐ POWER SEATS	☐ AIR CONDITION	DESCRIBE OTHER

DESCRIPTION OF TRADE-IN	YEAR	MODEL	MAKE

DISCLOSURE STATEMENT

1. Cash Price (including accessories, delivery, installation charges and sales taxes, if any)		$ 3534.20
2. Downpayment: Consisting of		
a. Cash Downpayment	$ 400.20	
b. Trade-in	n.a.	
c. Total Downpayment (2a & b)		400.20
3. Unpaid Balance of Cash Price (1 - 2c)		3134.00
4. Other Charges: Consisting of -		
*a. Physical Damage Insurance	163.00	
**b. Credit Life Insurance	n.a.	
**c. Accident & Health Insurance	n.a.	
d. Taxes (not included in Cash Price)	n.a.	
e. Official Fees	n.a.	
f.	n.a.	
g.	n.a.	
h. Total Other Charges (4a, b, c, d, e, f & g)		163.00
5. Unpaid Balance (Amount Financed) (3 + 4h)		3297.00
6. FINANCE CHARGE		791.16
7. Deferred Payment Price (1 + 4h + 6)		4488.36
8. Total of Payments (5 + 6)		4088.16
9. ANNUAL PERCENTAGE RATE		14.55 %

*4. PHYSICAL DAMAGE INSURANCE against accidental damage to the property for a term of 12 months as checked ☒ Comprehensive Coverage ☒ Fire Theft and Additional Coverage ☒ $ 100.00 Deductible Collision; ☐ Towing and Labor (if included, cost of $ _____ is included in premium). Insurance settlement will be based upon actual cash value of property at time of loss, not exceeding limits of liability set forth in policy, and payable to Buyer, Seller or assignee of Seller, as interests may appear.

BUYER MAY CHOOSE THE PERSON THROUGH WHICH THE INSURANCE IS TO BE OBTAINED.

**4. CREDIT LIFE AND/OR ACCIDENT AND HEALTH INSURANCE (coverage is for the term and in the amounts set forth in policy or certificate of insurance issued by, subject to

☐ The John Hancock Mutual Life Insurance Company, Boston, Mass., under its Group Policy No. 17680-GCI.

☐ IF OTHER POLICY,
NAME INSURER
HOME OFFICE
ADDRESS

See Notice to Buyer on reverse side of Buyer's Copy if Credit Life Insurance is Authorized

BUYER IS NOT REQUIRED TO OBTAIN CREDIT LIFE AND/OR ACCIDENT AND HEALTH INSURANCE COVERAGE.

The undersigned hereby affirms that (i) if a charge for credit life insurance is set forth in item 4b of this Disclosure Statement or (ii) if a charge for credit accident and health insurance is set forth in item 4c of this Disclosure Statement, each such charge was disclosed in writing to the undersigned prior to the execution by the undersigned of this statement and after such disclosure the undersigned specifically affirms that the undersigned desires to obtain the insurance for which such charge, if any, is set forth in item 4b or item 4c. The undersigned agrees that no insurance coverage is included in this contract unless a charge for such coverage is included in item 4b or 4c.

BUYER'S SIGNATURE X _____ DATE _____

CO-BUYER'S SIGNATURE X xxxxxxxxxxxxxxxxxxxxxxxxx DATE _____

BEST COPY AVAILABLE

10. Repayment Schedule: The Total of Payments is payable by Buyer at Seller's office designated herein, or at such office of any holder of this mortgage, in 36 instalments of $ 113.56 each, and one final instalment of $ 0, commencing on the 10 day of August, 19 72, and on the same day of each successive month thereafter, in accordance with the terms of a certain promissory note of even date herewith, which note, having been paraphed 'Ne Varietur' by the undersigned Notary Public for identification with this Act, has been delivered to the Seller who acknowledges receipt thereof.

11. Balloon Payment: $ _____ due, _____, 19____ Insert amount of any payment which is more than twice the amount of an otherwise regularly scheduled equal payment. Balloon Payment shall be paid when due and may not be refinanced

12. Delinquency Charges: Seller may collect, and Buyer hereby agrees to pay, a delinquency and collection charge on any instalment which shall not have been paid within 10 days after the date on which it becomes due and payable, in an amount not exceeding 5% of each such unpaid instalment, or $5, whichever is less. In addition to such delinquency charge, Buyer shall reimburse Seller for actual out-of-pocket collection expenses not exceeding $150 and attorneys fees of 25% of the total amount due and payable hereunder, with a minimum of $15 if this Sale and Chattel mortgage is referred to an attorney for collection.

13. Security Interest: Seller shall have a mortgage, lien and privilege, in the property until all amounts due under this Sale and Chattel Mortgage are paid in full

14. Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity and receive a refund credit computed in accordance with the Rule of 78s. Such rebate will be computed after first deducting from the finance charge an acquisition charge in the amount of $25.00; provided, however, that no acquisition charge will be made if more than one half of the term of this mortgage shall have elapsed. No rebate will be made in an amount of less than $1.00.

DECLARATION OF GOOD HEALTH—Applicable Where A Charge Has Been Authorized in 4b Above and Insurance Under John Hancock Group Policy No. 17680-GCI is Proposed: I, the Buyer proposed for life insurance, in order to induce John Hancock to effect such insurance, do hereby declare that to the best of my knowledge and belief I am now in good health. I hereby authorize any physician or hospital to disclose to John Hancock in the event of my death all information concerning my medical history prior to the date of this contract.

LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED.

Notice to the Buyer: Do not sign this contract before you read it (BOTH SIDES) or if it contains any blank spaces. You are entitled to an exact copy of the contract you sign.

Executed this 26 day of June, 19 72, and a completely filled-in copy delivered to Buyer who acknowledges receipt thereof. Accepted by the Seller and assigned to Chrysler Credit Corporation in accordance with the terms of the Assignment set forth on the reverse hereof.

Buyer Signs	Co-Buyer Signs
X S/ Cheryl Meyers	X

Seller:	By	Title
Clearview Dodge Sales, Inc.	S/A. J. Keller	Sect Treas

Witness	Witness
X S/N. Revon	X S/L. Marino

State of Louisiana, Parish of Orleans SS:

AFFIDAVIT OF WITNESS

On this 26 day of June, 19 72, before me, a Notary Public personally appeared L. Marino, a subscribing witness to the foregoing document, well known to me, who, being first duly sworn, did depose and say that said instrument was executed by the parties thereto in the presence of the affiant and of the other attesting witness as their free act and deed and that their genuine signatures appear thereto.

Subscribed and sworn to before me the day and year aforesaid.

Notary Public	Witness
S/D. Casey	X S/L. Marino

PROMISSORY NOTE

$ 4088.16 (Total of Payments) Metairie, Louisiana, June 26, 19 72

FOR VALUE RECEIVED, I (we jointly, severally and in solido) promise to pay to BEARER the sum of

Four Thousand Eighty Eight and 16/100 (Total of Payments) dollars ($ 4088.16)

in instalments of $ 113.56 each and one final instalment of $ _____, commencing on the 10 day of August, 19 72 and on the same day of each successive month thereafter until paid, together with a delinquency and collection charge on each instalment in default for 10 days or more in an amount not to exceed 5% of each such instalment or $5, whichever is less, plus actual out of pocket expenses of collection not to exceed $150 and attorneys fees of 25% of the total amount due and payable hereunder, with a minimum of $15 if this note is referred to an attorney for collection. If any instalment of this note be not paid when due or if the undersigned fail to comply with any of the terms and conditions of the Sale and Chattel Mortgage securing payment of this note, then all unpaid instalments shall, at holder's option immediately become due and payable. All without notice or demand. All parties hereto, including endorsers and guarantors, hereby severally waive presentment, demand for payment, protest and notice of non payment and protest and diligence in bringing suit against any part hereto, and all endorsers and guarantors consent that the time of payment may be extended from time to time after maturity without notice. All exemptions are hereby waived.

As per Chattel Mortgage and Note of this date, June 26, 19 72

Buyer Signs	Co-Buyer Signs
X S/ Cheryl Meyers	X

Addendum 1

(Front of page)

ORIGINAL

ADDITIONAL TERMS AND CONDITIONS

1. Buyer agrees with Seller, its successors and assigns (1) to pay the obligations secured by this mortgage and the promissory note executed herewith according to the terms thereof, (2) that he is the lawful owner of said property and the same is free of all liens, taxes and encumbrances (except as stated herein) and that he will keep same free of all liens, taxes and encumbrances, and any sum of money that may be paid by Seller in release or discharge thereof shall be paid on demand with interest at the highest lawful contract rate as an additional part of Buyer's obligation, (3) to maintain the property in good repair and exhibit it to the Seller on demand; (4) not to use it illegally, improperly or for hire (unless so stated on the face of this mortgage) (5) not to remove the said property from the state in which delivery is initially made to Buyer and cause or permit the said property to remain outside such state for a period of thirty days or more without the consent of Seller, or transfer or otherwise dispose of any interest in this mortgage or the property, (6) that no transfer, renewal, extension or assignment of this mortgage or any interest thereunder, and no loss, damage or destruction of the property, shall release Buyer from his obligation, (7) that time is of the essence of this mortgage and said promissory note and Seller's remedies hereunder are in addition to any given by law and may be enforced successively or concurrently (8) and warrants that the automobile traded in, if any, is free from any encumbrance, and breach of this warranty shall be a breach of this mortgage.

2. If Buyer defaults on any obligation under this mortgage, or if holder shall consider the indebtedness or the property insecure, the full balance shall without notice become due and payable forthwith, together with attorney's fees of 25% of the total amount due and payable under this mortgage, with a $15 minimum, if this mortgage is referred to an attorney for collection. Buyer agrees in any such case to pay said amount or, at Seller's election, to deliver the property to Seller, and Seller may, without notice or demand for performance or legal process, enter any premises where the property may be found, take possession of it and custody of anything found in it, and retain all payments as compensation for use of the property while in Buyer's possession. Seller may cause the property to be seized and sold under executory or other legal process, in the manner provided by applicable law, to the highest bidder (who may be the holder) for cash; the proceeds of sale, less all expenses of retaking, storing, repairing and selling, to the extent permitted by applicable law, shall be credited to the amount unpaid hereunder, Buyer shall remain liable for and shall forthwith pay any remaining balance, any surplus, however, to be paid to Buyer. Buyer hereby expressly waives the benefit of appraisement provided by Article 2723 and all laws conferring the same, and expressly waives the issuance of the notice and demand for payment provided by Article 2639 and the delays prescribed by Article 2331 of the Louisiana Code of Civil Procedure or any other laws pertaining thereto. Buyer hereby expressly agrees to the immediate seizure of said property in the event of suit hereon.

3. If Buyer defaults in any payment, or if Buyer fails to comply with any of the terms and conditions of said mortgage, or if Buyer fails to procure or maintain the vehicle insurance required hereunder, or a proceeding in bankruptcy, receivership or insolvency shall be instituted by or against Buyer or his property, Seller shall have the right at its election to declare the unpaid portion of the Total of Payments under said mortgage to be immediately due and payable, together with any other amount for which Buyer shall have become obligated thereunder or hereunder. Waiver by Seller of any default shall not be deemed a waiver of any other default. In the event of the aforementioned default due to non-payment or in the event of any of the aforementioned reasons Seller, its agents or representatives, may enter upon the premises where the property may be and take immediate possession of same including any equipment or accessories, and Seller may take possession of any other items in the property at the time of repossession, and hold the same without liability until demanded by Buyer. Any notice to Buyer shall be sufficiently given if mailed to the address of Buyer stated herein.

4. If Seller assigns this mortgage, the word "Seller" as used in said mortgage shall be understood to mean the one whose name is endorsed on the face of this mortgage as "Seller" (hereinafter referred to as "Original Seller") and any subsequent holder of said mortgage. Any subsequent holder of this mortgage shall acquire all of the Original Seller's interest in said mortgage and the property covered thereby, and shall be entitled to all the rights and privileges of Seller hereunder. All amounts then owing hereunder shall be paid by Buyer directly to such subsequent holder and any payments otherwise made shall be at the risk of Buyer, if not received by such subsequent holder. No warranties, express or implied, and no representations, promises or statements have been made by Seller unless endorsed hereon in writing. No modification of any of the terms and conditions hereof shall be valid in any event and Buyer expressly waives the right to rely thereon unless made in writing duly executed by the Seller. If the property covered by the mortgage is a new motor vehicle, the Original Seller hereby conforms its written warranty as has been made by the Original Seller. Buyer understands and agrees, that Buyer will settle directly with the Original Seller all claims, setoffs, counterclaims and any other defenses there may be against the Original Seller and that Buyer shall not set up any such claim, setoff, counterclaim or other defense against any such subsequent holder.

5. Buyer agrees to keep the mortgaged property insured at his own expense against substantial risk of damage, destruction, or loss for so long as any amount remains unpaid on the promissory note and mortgage, with loss payable to the Seller as its interest may appear and that he will deliver all such insurance policies upon receipt of same to holder. Buyer shall not be relieved of the obligation to procure and maintain vehicle insurance due to the inclusion of same in this mortgage, but such inclusion only authorizes Seller to attempt to obtain such insurance on Buyer's behalf through an authorized insurance agent. In the event of the failure of the Seller to procure such insurance, the amount so included in the Total of Payments payable hereunder shall be credited to the last maturing instalments hereunder in inverse order of maturity, except to the extent applied by Seller toward payment for comparable insurance protecting the interest of Buyer and Seller or Seller only. Upon cancellation or other termination of any vehicle insurance, the refund of premiums received by Seller will be credited or applied in a like manner. Seller may, but shall not be required to, and without prejudice to Seller's rights under the mortgage, if it does not, procure such vehicle insurance protecting (a) interest of Buyer and Seller or (b) interest of Seller only, if Buyer fails to procure or maintain such vehicle insurance or fails to furnish satisfactory evidence thereof upon request. In such event Buyer agrees to pay as an additional part of the obligation hereunder, a charge equal to the amount of the premium for such insurance obtained by Seller upon demand, or in Seller's sole discretion, in equal instalments concurrently with the instalments of the unpaid balance then remaining payable under said contract together with interest thereon at the highest lawful contract rate. The proceeds from vehicle insurance, by whomever procured, shall be applied toward replacement of the property or payment of the obligation hereunder, in the sole discretion of Seller.

6. Buyer hereby confesses judgment in favor of Seller for the full amount hereof of principal, delinquency and collection charges, interest if any, attorney's fees, taxes, assessments, license fees and all other expenses, charges and costs, to the extent permitted by applicable law. If Seller assigns this mortgage, Seller shall not be assignee's agent for transmission of payments or for any purpose. Upon full payment of Buyer's obligation, assignee may deliver all original papers, including any certificate of title, to Seller as Buyer's agent. Buyer declares that the property is owned in excess of all exemptions granted by law. All exemptions permitted to be waived are hereby waived by Buyer and Buyer assigns all rights thereunder to Seller.

7. As used herein, the term "Seller" includes the successors and assigns of the Original Seller (mortgagee).

8. Any provision hereof prohibited by the laws of any jurisdiction shall as to such jurisdiction be ineffective to the extent of such prohibition without invalidating the remaining terms and conditions hereof. This mortgage shall be governed by the laws of the state in which it is executed.

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ASSIGNMENT

FOR VALUE RECEIVED, the Seller named on the face of this contract (hereinafter called "Seller") hereby sells, assigns and transfers to Chrysler Credit Corporation (hereinafter called "Chrysler") his, its or their entire right, title and interest in and to the within contract and the property covered thereby, and authorizes Chrysler to do every act and thing necessary to collect and discharge obligations arising out of or incident to said contract and assignment. In order to induce Chrysler to accept assignment of the contract, Seller warrants that (i) the contract is genuine, legally valid and enforceable and arose from the sale of the within-described property, (ii) that such property is as represented to the Buyer who was quoted both a time sale and a lesser cash price, (iii) that the Buyer is not a minor, has capacity to contract and paid the downpayment as stated in the contract, (iv) that Seller has no knowledge of any fact that would impair the validity or value of the contract, (v) that title to said property is vested in Seller free of all liens and encumbrances, Seller has the right to assign such title and a certificate of title to the property, showing a lien or encumbrance for the benefit of Chrysler or Seller, has been or will be applied for forthwith if permitted by law. If there exists a breach of any such warranty, without regard to Seller's knowledge or lack of knowledge with respect thereto or Chrysler's reliance thereon, Seller hereby agrees unconditionally to purchase said contract from Chrysler, upon demand, for the full amount then unpaid whether said contract shall then be, or not be, in default. In addition, this assignment is subject to the provisions set out below in the paragraph initialed by Seller. Liability of Seller arising out of or incident to this assignment shall not be affected by any indulgence, compromise, settlement, extension, or variation, of terms of the within contract effected with or by the discharge or release of the obligation of Buyer or any other person interested, by operation of law or otherwise. Seller waives notice of acceptance of this assignment and notices of non payment and non performance of the contract.

INITIAL APPLICABLE PROVISIONS

☐ WITHOUT RECOURSE. The assignment of said contract is and shall be without recourse against the Seller.

☐ FULL RECOURSE. Seller unconditionally guarantees payment of the full amount remaining unpaid under said contract, and agrees to purchase said contract from Chrysler, upon demand, for the full amount then unpaid whether said contract shall then be, or not be, in default.

initl FULL REPURCHASE. Seller agrees to pay to Chrysler or order, without recourse, the said contract excepting that if Chrysler shall repossess the motor vehicle described therein and tender delivery of same to the Seller within 90 days after maturity of the earliest instalment of the said contract then unpaid, Seller will, upon demand, pay to Chrysler the then unpaid balance of the said contract, regardless of the condition of the said motor vehicle. Should it be necessary for Chrysler, its successors and assigns, to institute legal action to recover possession of the motor vehicle, Seller will repurchase such motor vehicle as provided above even though offered to it after the expiration of the 90 day period if the legal action was instituted within 90 days after the maturity of the earliest instalment remaining unpaid, and if the motor vehicle is offered to Seller within 30 days after the possession thereof by Chrysler, its successors and assigns, is legally indisputable.

☐ LIMITED REPURCHASE. Seller agrees to pay the said contract to Chrysler, or order, without recourse, except that Seller will comply with the terms and obligations of the foregoing Full Repurchase agreement (which are incorporated herein by reference), provided, however, that such obligations of Seller shall terminate hereunder upon payment to Chrysler by the Buyer of the first _____ monthly instalments within 15 days of their respective due dates.

☐ OPTIONAL REPURCHASE. If Chrysler repossesses the motor vehicle described in the said contract, Seller shall have the option on demand from Chrysler to pay Chrysler $ _____ or to buy the said motor vehicle from Chrysler for the then unpaid balance due in its then condition and location.

☐ TRUCK REPURCHASE. The said contract is hereby assigned to Chrysler in accordance with the terms and conditions of the Truck Financing and Repurchase Plan in effect between Seller and Chrysler on this date (which are incorporated herein by reference).

☐ TRUCK FINANCING. The said contract is hereby assigned to Chrysler in accordance with the terms and conditions of the Dodge Truck Retail Finance Plan Dealer Letter Agreement in effect between Seller and Chrysler Motors Corporation on this date (which are incorporated herein by reference).

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APPENDIX I

OPINION OF UNITED STATES COURT OF APPEALS THIRD DISTRICT

Janet M. MANNING, on behalf of herself and all others similarly situated, Appellant in Nos. 75-1908 and 75-1909, and Appellee in No. 75-1910.

v.

PRINCETON CONSUMER DISCOUNT COMPANY, INC., on behalf of itself and others similarly situated, Appellee in Nos. 75-1908 and 75-1909.

Appeal of SPRINGFIELD DODGE, INC., on behalf of itself and others similarly situated, Appellant in No. 75-1910.

Nos. 75-1908 to 75-1910

United States Court of Appeals, Third Circuit

Argued Feb. 3, 1976.
Decided March 22, 1976.
As Amended April 21, 1976.

Buyer brought action against automobile dealer and lender for allegedly failing to make disclosures required by the Truth in Lending Act. The United States District Court for the Eastern District of Pennsylvania, Clarence C. Newcomer, J., denied request for certification of defendants as representatives of a class, and entered summary judgment in favor of plaintiff and her class against dealer but in favor of

lender against plaintiff and her class, 390 F.Supp. 320, and thereafter adhered to such determinations on motion for reconsideration, 397 F. Supp. 504, and plaintiff and dealer appealed. The Court of Appeals, Weis, Circuit Judge, held that automobile dealer had statutory duty to disclose "credit sale" terms when he received a commission by referring customer to lender; that lender was not obliged to make duplicate disclosures; and that no error was shown in award of attorney fees.

Affirmed.

1. Pawnbrokers and Money Lenders 2.

Truth in Lending Act is intended to provide sufficient data to consumer so that he can make informed judgments on credit transactions. Truth in Lending Act, §§128, 129, 15 U.S.C.A. §§1638, 1639.

2. Pawnbrokers and Money Lenders 6.8

Automobile dealer has statutory duty, under the Truth in Lending Act, to disclose credit terms when he receives a commission for referring a customer to financing agency which advances the necessary funds. Truth in Lending Act, §§128, 129, 15 U.S.C.A. §§1638, 1639.

3. Federal Civil Procedure 181

In action under the Truth in Lending Act against, inter alia, automobile dealer which had allegedly arranged credit but failed to make "credit sale" disclosures required by the Act, in which plaintiff failed to substantiate allegation that there was an industrywide practice of treating credit sales as

if they were loan transactions or to establish the number of sellers whose conduct was the same as defendant's, there was no error in conclusion that plaintiff did not present adequate evidence to supply the "numerosity" and "typicality" requirements of class action rule, for purposes of certification of a class of defendants. Truth in Lending Act, §§ 128, 129, 15 U.S.C.A. §§ 1638, 1639; Fed. Rules Civ. Proc. rule 23, 28 U.S.C.A.

4. Pawnbrokers and Money Lenders 6.8

Transaction in which automobile dealer received a commission for referring customer to financing agency involved "arranging credit" by seller, and was a "credit sale," so as to necessitate "credit sale" disclosures, though seller did not also participate in preparation of contract documents; seller "arranges credit" if he either accepts a fee or participates in preparation of contract documents for extension of credit with knowledge of their terms. Truth in Lending Act, §§103, 105, 15 U.S.C.A. §§1602, 1604.

See publication Words and Phrases for other judicial constructions and definitions.

5. Pawnbrokers and Money Lenders 6.8

Where both financing agency and automobile dealer who received a commission for referring customer to the agency were "creditors" under the terms of the Truth in Lending Act,it was not necessary that both make the same disclosures required with respect to credit sales; rather, dealer was responsible for making the disclosures; however,if seller is divorced from the credit arrangement, lender must supply the information which pertains only to the amount

of money being received and its cost, without reference to the underlying sales transaction. Truth in Lending Act, §§106(a), 121, 128, 129, 15 U.S.C.A. §§ 1605(a), 1631, 1638, 1639; Truth in Lending Regulations, Regulation Z, §§ 226.6 (d), 226.8(b-d), 15 U.S.C.A. following section 1700.

6. Pawnbrokers and Money Lenders 9

In action under the Truth in Lending Act, attorney fee may be awarded to a legal services office. Truth in Lending Act, § 130(a), 15 U.S.C.A. § 1640(a).

7. Pawnbrokers and Money Lenders 9, 10.

In action under the Truth in Lending Act in which it was found that automobile dealer which had arranged credit had failed to make required credit sale disclosures, there was no error in imposing penalty and attorney fees on dealer despite contention that the violation was very technical and despite fact that it was unlikely that purchaser was unaware of undisclosed terms as to selling price, down payment and balance, where there was no disclosure of commission arrangement between seller and lender, and where a similar nondisclosure suit, which was still pending at the time of incident, had been filed against the dealer some three years earlier. Truth in Lending Act, § 130(a), 15 U.S.C.A. § 1640 (a).

8. Courts 405 (16.16)

In action under the Truth in Lending Act, no record was presented for review with respect to contention that award of attorney fees to plaintiff was excessive where there was

no transcript of hearing and where defendant did not record its objection in district court either by answering petition for fees or during hearing. Truth in Lending Act § 130(a), 15 U.S.C.A. §1640(a).

Robert J. Hobbs, National Consumer Law Center, Inc., Boston, Mass., amicus curiae for appellant, Janet M. Manning; Blank, Rome, Klaus & Comisky, Philadelphia, Pa., of counsel.

David A. Scholl, Delaware County Legal Assistance Ass'n. Inc., Chester, Pa., for Janet M. Manning, etc.

John B. Brumbelow, Alan C. Gershenson, Philadelphia, Pa., for Princeton Consumer Discount Co., Inc.

John J. Robinson, Upper Darby, Pa., for Springfield Dodge, Inc., etc.

OPINION OF THE COURT

WEIS, Circuit Judge.

[1,2] The Truth in Lending Act is intended to provide sufficient data to the consumer so that he can make informed judgments on credit transactions. This appeal is concerned with interpretation of the Act and administrative regulations in connection with the purchase of an automobile. We conclude that an automobile dealer has the statutory duty to disclose credit terms when he receives a commission for referring a customer to the financing agency which advances the necessary funds.

Plaintiff, Mrs. Janet Manning, agreed to purchase a used car from defendant Springfield Dodge, Inc. on March 2, 1974. Springfield's credit manager obtained the necessary information for financing from the plaintiff, and arranged for a $1,191.00 loan from defendant Princeton Consumer Discount Company. Prior to this incident, Mrs. Manning had never transacted any business with Princeton, but on occasion Springfield had directed customers to the loan company, receiving a commission in return.

On March 11, 1974, after informing Mrs. Manning that all the preparations had been made, Springfield arranged to have its employee drive Mrs. Manning to Princeton's office. There she signed a number of documents and received a check in the amount of $1,191.00 payable to her and to Springfield Dodge. She then returned to the automobile dealer, endorsed the check and took possession of the car.

Princeton made the consumer loan disclosures to the plaintiff required by §129 of the Truth In Lending Act, 15 U.S.C. §1639, including, *inter alia;* the amount of credit; the charges; the finance charge, expressed in dollars and annual percentage rate; the default provisions; and the security interest acquired by the lender. However, neither Springfield nor Princeton made the "credit sale" disclosures listed in §128, 15 U.S.C. §1638. This section requires disclosure of matters identical to those in §129 and, in addition, specifies several others.

Asserting a violation of the Truth In Lending Act, plaintiff filed suit in the district court seeking the statutory penalty, attorneys' fees, and injunctive relief for a class which she sought to represent. For purposes of injunctive

relief, plaintiff was certified as "the representative of all those who had been, or will be, denied their rights under 15 U.S.C. §1638 by defendant Springfield Dodge." Her request for certification of the defendants as representatives of all creditors who participated in transactions in which the seller arranged credit, but in which only §129 disclosures were made, was denied because of failure of proof.

After an exchange of interrogatories and answers, the plaintiff and Princeton moved for summary judgment. The district court found that Princeton, as lender, was not required to make any further disclosures, but that Springfield, as seller, was liable to the plaintiff for failure to comply with §128. The court entered judgment in the amount of $1,000.00 together with a counsel fee of $1,980.00 in favor of the plaintiff and against Springfield. On appeal, plaintiff renews her contention that the seller Springfield and lender Princeton had joint and several obligations to make the credit sale disclosures, and that the defendants should have represented a class.

[3] Plaintiff's motion to certify Springfield as a class representative was denied because she failed to substantiate her allegation that there is an industry-wide practice of treating credit sales as if they were loan transactions. Nor did she establish the number of sellers whose conduct was the same as defendants. We find no error in the district court's conclusion that the plaintiff did not present adequate evidence to supply the "numerosity" and "typicality" requirements of Fed. R Civ. P. 23.

[4] The district court found that, on the undisputed facts, the transaction was a "credit sale" as defined by the Truth in Lending Act. We agree.

Section 103, 15 U.S.C. § 1602, defines a "credit sale" as one in "which credit is extended or arranged by the seller." Regulation Z of the Federal Reserve Board[1] interprets "arranging credit" as follows:

> " 'Arrange for the extension of credit' means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit receives or will receive a fee, compensation, or other consideration for such service or has knowledge of the credit terms and participates in the preparation of the contract documents required in connection with the extension of credit. . . ." 12 C.F.R. §226.2(f).

Although it admits receiving a commission from Princeton as a result of the Manning loan, Springfield interprets the regulation to apply only if the seller has participated in the preparation of the contract documents in addition to accepting a fee. Concededly, the regulation is not a model of clarity; but we accept the district court's view that the interpretation Springfield urges is strained and unconvincing. If the seller either accepts a fee or participates in the preparation of contract documents for extension of credit with knowledge of its terms, then he arranges credit. *See Starks v. Orleans Motor, Inc.*, 372 F.Supp. 928 (E.D. La. 1974), *aff'd*, 500 F.2d 1182 (5th Cir. 1975).

[5] Since this was a credit sale, both Springfield and Princeton are "creditors" under the terms of the Act. However, whether both or only one of them is responsible

1. The Act empowers the Federal Reserve Board to promulgate appropriate regulations for carrying out the statutory purpose. 15 U.S.C. § 1604.

for making the statutory disclosures is not specified in the statute. While §121, 15 U.S.C. §1631, says that each creditor shall disclose to each person the information required, the Board has not considered that section as being applicable to the multiple creditor transaction. Practical considerations lead to the conclusion that needless duplication of information extended to consumers is neither necessary to the Act's purpose nor justifiable in terms of expense. To clarify the situation, the Board promulgated a regulation, 12 C.F.R. §226.6(d), which provides:

> "(d) *Multiple creditors; joint disclosure.* If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and the purview of his relationship with the customer.
>
> If two or more creditors make a joint disclosure, each creditor shall be clearly identified.
>
> The disclosures required under paragraphs (b) and (c) of §226.8 shall be made by the seller if he extends or arranges for the extension of credit.
>
> Otherwise disclosures shall be made as required under paragraphs (b) and (d) of § 226.8."

We note that subparagraph (b) of Regulation § 226.8 lists those items common to the disclosures required by §§ 128 and 129 of the Act. Subparagraph (c) of that regulation applies to the items applicable only by reason of the Act's §128 (credit sales), and subparagraph (d) of the regulation to those pertaining to § 129 of the Act (consumer

loans).

The omissions of which plaintiff complains are those found in the regulation subparagraph (c); the cash price of the car, the amount of down payment, and the unpaid balance of the cash price.[2] She argues that since both Princeton and Springfield were creditors and the statute requires "each creditor" to furnish the specified information, both had to disclose. The district court reasoned that the multiple creditor regulation was not intended to result in duplicate notification,and that the seller was responsible for making the disclosures. We do not find this conclusion to be erroneous.

The regulation requires that if the seller extends or arranges credit, as occurred here, then it must make the disclosures required under (b) and (c) of Regulation §226.8. As we observed earlier, those two subsections track §128 of the Act. By transposition, the regulation states that the disclosures required by the Act's §128 for credit sales shall be made by the seller when he extends or arranges for the extension of credit.

The concluding sentence of 12 C.F.R. §226.6(d) reads: "Otherwise disclosures shall be made as required under paragraphs (b) and (d) of §226.8." The language is far from clear, but we interpret the last sentence to mean that "otherwise" applies when the seller does not extend or arrange for credit. In that instance the lender or other creditor must make the disclosures of Regulation paragraphs (b) and (d) pertaining to credit loans under Act §129.

2. We note also that the plaintiff did not receive information about the commission which Springfield received from Princeton. *See Truth In Lending* §106, 15 U.S.C.§1605(a), and 12 C.F.R.§226.4(a).

In short, we hold that if the transaction is one in which the seller arranges credit, the obligation of disclosure is placed upon him by the third sentence of Regulation §226.6(d). In that factual situation the specific direction of the third sentence prevails over the general language limiting the scope of disclosure to items within the creditor's knowledge and the purview of his relationship with the customer.

If the seller is divorced from the credit arrangement, then the lender must supply the information which pertains only to the amount of money being received and its cost, without reference to the underlying sales transaction.[3] Because the burden of full disclosure was placed upon the seller, it is our view that if additional and duplicative disclosure had been intended, the regulation would have set that forth with equal explicitness.

The plaintiff's position that both seller and lender must supply the same information appears to be based on a "fail-safe" theory, *i. e.*, it is unlikely that both would be remiss and, hence, it is more likely that the consumer would receive the information. But Congress evidently thought that in the single creditor situation the sanctions it provided were adequate to assure compliance. We see no reason why

3. The conclusion we have reached is consistent with an advisory letter dated June 4, 1970 written by Frederic Solomon, Director of Consumer and Saver Affairs of the Federal Reserve Board. CCH Consumer Credit Guide, ¶30,399.

We think that since a credit sale is involved here, rather than a revolving credit plan, the letter by Mr. Solomon of April 28, 1972, CCH Credit ¶30,841, is not applicable.

the same reasoning does not apply in a transaction in which one of two creditors has been singled out as the one required to meet the statutory mandate. Nor can we believe that the Act's purpose of providing the consumer with adequate information is better served by giving him two sheets of paper, rather than one, when both contain exactly the same data.[4] It is interesting that the plaintiff's interpretation which requires more copies than needed smacks more of bureaucracy than the regulation of the government agency involved.

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4. Plaintiff calls attention to several "conduit" cases in which more than one creditor was found to be liable for disclosures. However, each is distinguishable.

Kriger v. European Health Spa, Inc., 363 F.Supp. 334 (E.D. Wis. 1973), held that both the Spa and its assignee, First Wisconsin National Bank, fell within the Act's definition of "creditor" and that each was liable for disclosures. The court, however, did not discuss §226.6(d) as it applies to a multiple creditor situation.

The same comment is true of *Philbeck v. Timmers Chevrolet, Inc.*, 361 F.Supp. 1255 (N.D.Ga. 1973), *rev'd on other grounds, 499 F.2d 971* (5th Cir. 1974). Since the court of appeals found that the disclosures were adequate, contrary to the district court's view, there was no occasion to discuss which creditor had the duty to disclose.

Garza v. Chicago Health Clubs, Inc., 347 F.Supp. 955 (N.D.Ill. 1972), did not consider the effect of §226.6(d).

In the matter of Virginia Mortgage, Inc., opinion of February 10, 1976, docket 9007, FTC, was concerned with a loan brokerage arrangement rather than with a seller who arranges credit, hence the first, rather than third, sentence of Regulation §226.6(d) would apply. It is interesting that while in that case duplicate disclosure was required in the absence of a joint statement, the FTC said, "Given two statements, however, similar or identical to the casual eye and each purporting to describe the same loan, even the most devoted comparison shopper may reasonably conclude that life is too short to study them both."

The trial court properly entered judgment in favor of Princeton.

Defendant Springfield contends that the district court erred in awarding counsel fees because:

1. the plaintiff was represented by a public law firm;

2. the violation was of a very technical nature; and

3. the fees allowed were excessive.

[6] A creditor who fails to provide any information required to be disclosed to the consumer is liable "for a reasonable attorney's fee." 15 U.S.C. §1640(a). The Act does not make the award contingent upon the plaintiff's obligation to pay her attorney or whether a fee in fact was charged. We agree with the Court of Appeals for the Fifth Circuit that, in the absence of express limitation in the Act, a fee may be awarded to a legal services office. *Sellers v. Wollman*, 510 F.2d 119 (5th Cir. 1975).

[7] Although it is extremely unlikely that the purchaser was not aware of the undisclosed terms, *i. e.*, selling price, down payment and balance, we cannot say that the district court erred in imposing the penalty and attorneys' fees under the circumstances here. *Cf. Stefanski v. Mainway Budget Plan, Inc.*, 326 F.Supp. 138 (S.D. Fla. 1971), *rev'd on other grounds*, 456 F.2d 211 (5th Cir. 1972). The record reveals that a similar non-disclosure suit had been filed against Springfield some three years earlier. While that case was still unresolved at the time of this incident, the defendant had more than the usual notice of the provisions of the Act. Moreover, there had not been a disclosure of the

commission arrangement between the seller and the lender. The commission aspect obviously affected the total cost of credit. *See Zeltzer v. Carte Blanche Corporation*, 514 F.2d 1156, 1164 (3d Cir. 1975). Accordingly, we deem this disclosure omission significant.

[8] The defendant objects to the amount of the fee, but the record on this phase of the case is deficient. On June 12, 1975, the plaintiff filed a petition containing the number of hours counsel had spent on the case and a request for compensation at the rate of $60.00 per hour, totalling $2,990.00. On June 27, 1975, the court heard argument on the petition and entered an order setting the fee at $1,980.00.

The defendant now contends that it was not given the opportunity to inquire into the number of hours actually required or the basis for the hourly rate. The difficulty with this contention is that there is no transcript of the hearing, and the defendant did not record its objections in the district court,either by answering the petition or during the hearing. Accordingly, there is no record presented to us for review.

The judgment of the district court will be affirmed.

APPENDIX J (1)

OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: Sep 28, 1976

DEBORAH A. WILLIAMS	CIVIL ACTION
VERSUS	NO. 74-3379
BILL WATSON FORD, INC. and FORD MOTOR CREDIT CO.	SECTION G

OPINION

SEAR, District Judge:

This is a suit under the Truth in Lending Act for damages and attorney's fees.

On August 27, 1974, defendant Bill Watson Ford prepared a Louisiana Automobile Retail Installment Contract and a note and chattel mortgage in connection with the sale of a used 1974 Mercury Montego to the plaintiff. The Contract served as the disclosure statement required by the Truth in Lending Act and had been furnished in blank to Watson by defendant Ford Motor Credit Company. The note and mortgage were subsequently assigned to Ford Motor Credit in accordance with prior arrangements between Watson and Ford Motor Credit.

(2) The charge for "Official fees" and a charge of $15.00 for "License, title and registration fees" exceeded the amounts actually paid by Watson for these services and therefore contained hidden finance charges which should have been revealed to plaintiff.

(3) An acceleration clause set out on the reverse side of the disclosure statement constituted a default charge and, as such, should have been revealed either on the front of the disclosure statement above or adjacent to the plaintiff's signature, or on a separate statement identifying the transaction.

Each issue may be separately considered:

NOTARY'S FEE

The purpose of the Truth in Lending Act is to promote the informed use of credit by consumers by enforcing a meaningful disclosure of credit terms. 15 U.S.C. §1601. Among the required disclosures, a creditor must reveal the amount of the finance charge and the finance charge expressed as an annual percentage rate. 15 U.S.C. §1638 (6) (7). The regulations adopted by the Federal Reserve Board pursuant to the Truth in Lending Act, popularly known as Regulation Z, specify the method by which the finance charge is determined with the following qualification:

> "If itemized and disclosed to the customer, any charges of the following types need not be included in the finance charge:
>
> (1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting or releasing or satisfying any security related to the credit transaction."

12 C.F.R. §226.4(b) (1).

The disclosure statement furnished to the plaintiff listed a $3.50 charge for "Official fees". This fee was assessed for the notarization of four separate items in connection with the sale. Plaintiff argues that any charge incident to the extension of credit must be included in the finance charge unless it is specifically excludable from the finance charge by statute or regulation, and that §226.4(b)(1) does not provide such an exemption in this case since a notary's fee is not a charge imposed by law for the perfection of a security interest.

We disagree. Louisiana law does indeed require authentication of certain documents in order to perfect a security interest in the context of the credit sale of an automobile. *See, e.g.*, La. R.S. 9:5353. Furthermore, we agree with Judge Rubin's reasoning in George v. General Finance Corp. of Louisiana, E.D. La. 1976, 414 F.Supp. 33, 35 that:

> "While a notary public is not an elected public official, . . . the office is a public one. It was necessary to have the mortgage notarized and recorded to perfect the security retained by the creditor."

Therefore, we hold that a notary's fee falls within the exception delineated by §226.4(b)(1) and need not be included in the finance charge if it is separately itemized on the

disclosure statement.

HIDDEN FINANCE CHARGES

The general manager of defendant Bill Watson Ford testified at trial that it was the defendant's practice to assess a flat notary's fee of $3.50 on every used car sale. This amount was deposited by the general manager into his "notary's account" from which the defendant retained the services of a notary at a salary of $250 a month. The $3.50 was never paid directly to the notary, nor did his compensation fluctuate in relation to the number of documents he notarized each month. It is therefore entirely possible that the notary never received this particular fee or that he received only a part of it. Plaintiff argues that to the extent the $3.50 exceeded the amount actually paid to the notary, it contained a hidden finance charge which accrued to the secret profit of Watson.

We agree. In light of Watson's financial arrangements with its notary, the mere listing of the $3.50 charge as a notary's fee was inadequate. A disclosure of the precise amount paid to the notary was required, with the excess to be included in the finance charge. Therefore, the disclosure statement violated 15 U.S.C.§ 1638(6), (7) and 12 C.F.R. §226.8(c)(8). *Cf.* Starks v. Orleans Motors, Inc., E.D. La. 1974, 372 F.Supp. 928, 932, *aff'd* 5 Cir., 500 F.2d 1182; Meyers v. Clearview Dodge Sales, Inc., E.D. La. 1974, 384 F.Supp. 722, 725.

By the same reasoning, the charge of $15.00 for "License, title and registration fees" listed on the disclosure statement was also in violation of the Act and Regulation Z insofar as it contained a hidden finance charge. It was

shown at trial that Watson charged a standard fee of $15.00 for license, title and registration charges. However, the exact amount required by Louisiana law was $10.50, composed of $3.50 for the title, $6.00 for the license, and $1.00 for recordation. La. R.S. 32:733; La. R.S. 47:463. Again, the disclosure statement violated 15 U.S.C.§ 1638(6), (7) and 12 C.F.R. § 226.8(c)(8). Starks v. Orleans Motors, Inc., E.D. La. 1974, 372 F.Supp. 928, 932, *aff'd* 5 Cir., 500 F. 2d 1182; Meyers v. Clearview Dodge Sales, Inc., E.D. La. 1974, 384 F.Supp. 722, 725.

ACCELERATION CLAUSE

On the reverse side of the disclosure statement furnished to the plaintiff, provision was made for acceleration of the debt upon default:

> "Buyer does hereby declare that in the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any of the terms and conditions hereof, or a proceeding in bankruptcy, receivership or insolvency shall be instituted by or against Buyer or his property, or Seller deems the Property in danger of misuse or confiscation, or Seller otherwise reasonably deems the indebtedness or the Property insecure, Seller shall have the right, at its election, to declare the unpaid portion of the Total of Payments and said promissory note, together with any other amount for which Buyer shall have become obligated hereunder, to be immediately due and payable."

Plaintiff contends that the acceleration clause should have

been disclosed on the face of the statement in accord with 16 U.S.C. § 1638(a)(9) which requires disclosure of "default, delinquency, or similar charges payable in the event of late payments," and in accord with 12 C.F.R.§ 226.8(b)(4) requiring the disclosure of "the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments." Defendants argue that a right of acceleration is not a "charge" within the meaning of either of these provisions, since acceleration does not impose upon the consumer any cost above the amount already due under the contract, particularly when Louisiana law requires that unearned interest at the time of acceleration be rebated to the consumer. La. R.S. 9:3528. If acceleration is not a "charge", neither the Act nor Regulation Z require its disclosure.

The issue presented is a complex one and has been the subject of many conflicting decisions since the Truth in Lending Act was enacted. The first case to consider the question, Garza v. Chicago Health Clubs, Inc., N.D. Ill. E.D. 1972, 347 F.Supp. 955, concluded that acceleration clauses are charges which must be disclosed. The Court referred to the meaning of the word "charges" as defined by Black's Law Dictionary 294 (4th Ed. 1951): a synonym for "obligation" or "claim".

> "Considering these definitions and the purpose of the statute and regulation to inform consumers of credit costs and terms so they can effectively choose between sources of credit (TIL § 102, 15 U.S.C.§ 1601), it seems clear that the acceleration of the balance of the debt should be considered a 'charge'. . . ."

347 F.Supp. at 959. This aspect of the *Garza* decision has been challenged on the ground that it took the word "charges" out of context, ignoring the import of the entire phrase "default, delinquency, or similar charges".

> "In considering the word 'charges' apart from the language that modifies it, the . . . court not only used a method of analysis which is inconsistent with well established principles of statutory interpretation but also derived a definition of that term which does not comport with the purpose of section [1638 (a) (9)]."

Johnson v. McCrackin-Sturman Ford, Inc., 3 Cir. 1975, 527 F.2d 257, 265. The *Johnson* court went on to propose that the phrase "default, delinquency, or similar charges" should be given its generally accepted meaning in the consumer credit industry, i.e., specific monetary sums which are imposed because of late payment over and above amounts already due under the loan. The court pointed out that if upon acceleration unearned interest is rebated, no additional charge is imposed; the only modification of the terms of the agreement is a shortening of the time for repayment of the principal. *Johnson* concluded that acceleration clauses are not "charges" at least when unearned interest is rebated, and need not be disclosed.

It is tempting to distinguish the *Garza* case on the basis that it did not consider the effect of a rebate of unearned interest in equating acceleration clauses with charges. The issue is not so neatly disposed of, however. Meyers v. Clearview Dodge Sales, Inc., E.D. La. 1974, 384 F.Supp. 722 found that an acceleration clause is a charge regardless of

whether unearned interest is rebated defining a "charge" as:

> ". . . any pecuniary burden, expense or obligation. The acceleration of the balance of the debt against one who is late with a payment certainly results in a considerable immediate pecuniary burden for one attempting to avoid foreclosure. The Truth-In-Lending Act was intended to require the disclosure of exactly this type of credit information."

Id. at 727.

Yet another tangent was developed by the court in Woods v. Beneficial Finance Co. of Eugene, D. Ore. 1975, 395 F.Supp. 9. The court dismissed the "charge" controversy as a "fine semantical distinction" without merit. *Id.* at 16. Instead, the court held that acceleration clauses must be disclosed pursuant to the general purpose section of the Act, 15 U.S.C.§ 1601 (in part):

> "It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. . ."

Because of its reliance on a very general section of the Act, rather than a specific directive, the Court applied its decision only prospectively.

The decisions discussed are illustrative of the conflicts between circuit and district courts, and even between courts within the same circuit or district, which have arisen over

this issue. Some take the position that acceleration clauses must always be revealed. LaGrone v. Johnson, 9 Cir. 1976, 534 F.2d 1360; Burley v. Bastrop Loan Co., Inc. W.D. La. 1976, 407 F.Supp. 773; Kessler v. Associates Financial Services Co. of Hawaii, Inc., D. Hawaii 1975, 405 F.Supp. 122 (prospective only); Woods v. Beneficial Finance Co. of Eugene, D. Ore. 1975, 395 F.Supp. 9 (prospective only); Pollock v. Avco Financial Services, N.D. Ga. 1974, CCH Consumer Credit Guide ¶ 98,766; Hall v. Sheraton Galleries of Atlanta & General Electric Corporation of Georgia, N.D. Ga. 1974, CCH Consumer Credit Guide ¶ 98,737; Meyers v. Clearview Dodge Sales, Inc., E.D. La. 1974, 384 F.Supp. 722; Garza v. Chicago Health Clubs, Inc., N.D. Ill. E.D. 1972, 347 F.Supp. 955. Others turn on whether unearned interest is rebated. Within this category some cases have looked only to the explicit provisions of the contract to find a rebate clause, while others have held that a rebate clause may be implied in the contract if state law requires a rebate of unearned interest upon acceleration. Johnson v. McCrackin-Sturman Ford, Inc., 3 Cir. 1975, 527 F.2d 127 (state law); Houston v. Atlanta Federal Savings & Loan Association, N.D. Ga. 1976, 414 F.Supp. 851 (contract); Thompson v. Twin City Finance Corp., W.D. La. 1976, 409 F.Supp. 924 (contract); Cosby v. Mellon Bank, W.D. Pa. 1976, 407 F.Supp. 233 (state law); Frank v. Reserve Discount Co., W.D. Pa. 1975, 398 F.Supp. 703 (state law); Jones v. East Hills Ford Sales, Inc., W.D. Pa. 1975, 398 F.Supp. 402 (state law); Barrett v. Vernie Jones Ford, Inc., N.D. Ga. 1975, 395 F.Supp. 904 (contract); Barksdale v. Peoples Financial Corp. of Alpharetta, N.D. Ga. 1975, 393 F.Supp. 112 (state law); Gresham v. Household Finance Corp., Civil Action No. 74-2189 (N.D. Ga. Nov. 13, 1975) (contract); McDaniel v. Fulton National Bank of Atlanta, N.D. Ga. 1974, 395 F.Supp. 422 (contract); Pugh v. Ameri-

can Tractor Trailer Training, Inc., D.Conn. 1974, CCH Consumer Credit Guide ¶98,927 (contract); Hamlet v. Beneficial Finance Co., N.D. Ga. 1974, CCH Consumer Credit Guide ¶98,646 (law). Still other cases have held, for one reason or another, that acceleration clauses are exempt from disclosure in all cases, whether or not unearned interest is rebated. St. Germain v. Bank of Hawaii, D. Hawaii 1976, 413 F.Supp. 586; Wiggs v. BMA Investment Co., N.D. Ga. 1974, CCH Consumer Credit Guide ¶98,676; Washington Motor Sales v. Ferreira, N.J. 1974, 329 A. 2d 599.

In this case, the acceleration clause is unclear on the question of unearned interest. Louisiana law on the subject is contained in Part III of the Louisiana Consumer Credit Law entitled "Prepayment of Consumer Credit Transactions" and consisting of the following three provisions:

"§3527. *Right to prepay.*

Notwithstanding any contrary provision of a consumer credit transaction, the consumer may prepay in full the unpaid balance at any time.

"§3528. *Rebate upon prepayment.*

Upon prepayment in full of a pre-computed consumer credit transaction, the extender of credit shall refund unearned loan finance charges or credit service charges and such refund shall represent at least as great a proportion of the loan finance charge or credit service charge after first deducting from such charge a prepayment charge of not more than twenty-five dollars, as the sum of the monthly time balances beginning one month after the month in which prepayment is made, bears to the sum of all the monthly time

balances under the schedule of payments in the contract; this method of rebate upon prepayment is commonly referred to as the 'Rule of 78' or the 'Sum of the Digits' rebate method. If more than one-half of the term of the installment contract has elapsed, the rebate shall be computed without deducting a prepayment charge. No rebate less than one dollar is required.

"§3529. *Rebate after acceleration of maturity.*

Except as provided in R.S. 9:3525, if the maturity is accelerated for any reason and suit is filed, the obligation shall be credited with the same rebate as if prepayment in full had been made on the date of filing of suit, thereafter the obligation sued upon shall be deemed to bear a loan finance charge or credit service charge on the amount due not to exceed the rate previously charged on the obligation.

In dealing with a similar problem, the court in Burley v. Bastrop Loan Co., Inc. W.D. La. 1976, 407 F.Supp. 773, concluded:

> ". . . Louisiana law obligates the accelerating creditor to rebate the unearned interest on an obligation, [but] this rebate is conditioned upon his filing suit to collect the obligation; the creditor has the *power* but not the *right* to collect interest as yet unearned on the obligation."

Id. at 780-81. We believe that the *Burley* court misinterpreted Louisiana law when it held that an acceleration

would not entitle the consumer to a rebate of unearned interest unless suit was filed. That interpretation may have resulted from an overly zealous scrutiny of La. R.S. 9:3529. In isolation, that provision supports the *Burley* reading. We feel, however, that consideration of the preceding provisions and the context in which they appear leads to a different conclusion. By denominating this portion of the Louisiana Consumer Credit Law "Prepayment of Consumer Credit Transactions" and including within it a provision explicitly regulating acceleration, it is clear that the Louisiana legislature considered acceleration to be a form of prepayment. Once this basic premise is established, it also follows that La. R.S. 9:3528 requiring rebate of unearned interest upon prepayment applies not only to voluntary prepayment on the part of the consumer, but also to prepayment elicited by the creditor through enforcement of an acceleration clause. La. R.S. 9:3529 provides for the computation of interest in the event a creditor has had to resort to the filing of a lawsuit to collect on the obligation. It designates a fictional date of prepayment for purposes of determining the rebate, and affords the creditor an added measure of interest from that date forward. In so doing, La. R.S. 9:3529 in no way abrogates the consumer's right to a rebate of unearned interest under La. R.S. 9:3528 if upon acceleration he voluntarily pays off the debt.

We are persuaded by the principle that the laws of the state in which a contract is executed become a part of the contract, and so find that since Louisiana law requires that unearned interest be rebated upon acceleration, the acceleration clause in this contract imposes no additional expense upon the consumer and is therefore not a "charge" which must be revealed pursuant to 15 U.S.C.§ 1638(a)(9) and 12 C.F.R.§ 226.8(b)(4). Johnson v. McCrackin-Sturman Ford,

Inc., 3 Cir. 1975, 527 F.2d 257. Moreover, we reject the use of the general purpose section of the Truth in Lending Act as an alternative basis for requiring disclosure of acceleration clauses. 15 U.S.C. § 1601. We fully agree that:

> "The right to accelerate the unpaid balance upon default by the borrower is not a useless right to the lender nor is it of little practical consequence to the borrower. Rather, the right to such acceleration is of such importance that its existence or non-existence would certainly influence the borrower's selection of a loan arrangement."

Kessler v. Associates Financial Services Company of Hawaii, Inc., D. Hawaii 1975, 405 F.Supp. 122, 124. However, we decline to manufacture a specific disclosure requirement in the absence of such a provision in the Act.

> "The specific provisions of the Act and Regulations regarding disclosure requirements should be complied with precisely by creditors to provide the correct credit information and uniformity in terminology which Congress mandated. But the stringent disclosure requirements of [15 U.S.C. § 1639] should not be enlarged beyond the specific terms of the Act and Federal Reserve Board regulations simply to conform to some judicial notion as to the congressional purpose and intent which may be revealed in [15 U.S.C. §1601']. The test is not what a court may consider more beneficial, informative, and understandable to the borrower than the specific requirements of the Act and Regulations. That is the province of the legislative branch. The test to

be applied in determining whether a violation exists is whether there has been compliance with the specific requirements of the Act and the Regulations of the Federal Reserve Board promulgated under broad powers in the light of commercial realities."

McDaniel v. Fulton National Bank of Atlanta, N.D. Ga. 1974, 4 CCH Consumer Credit Guide ¶ 98,683 at 88,259 (report of special master) reversed on the ground that Georgia law permits acceleration of unearned interest in some instances, 395 F.Supp. 422.

Before leaving this issue, one further point raised by Burley v. Bastrop Loan Co., Inc., W.D. La. 1976, 407 F. Supp. 773, deserves discussion. The Court in that case noted that under Louisiana law, a rebate of unearned interest upon acceleration is calculated under the Rule of 78's. It then argued:

"One Court has held that such a rebate does impose an additional charge upon a loan customer. *Scott v. Liberty Finance Co.*, 380 F.Supp. 475 (D. Neb., 1974). A comparison of rebates calculated by the Court and the Rule of 78's established that there was a sizeable error as to the latter method, resulting in additional cost being borne by the debtor.

"A more detailed analysis of the Rule of 78's rebate scheme made by an actuary may be found in a recent law review article. J. Hunt, "The Rule of 78, Hidden Penalty in Prepayment in Consumer Credit Transactions," 55 Boston U.L. Rev. 331

(1975). The actuary first calculated a rebate according to the Rule of 78's and then by the actuarial or U.S. Rule, first laid down in *Story v. Livingston*, 13 Pet. 359, 370, 10 L.Ed 200 (1839) and,with modifications, approved for use in credit transactions by 15 U.S.C.§ 1606. The actuary demonstrated that the rebate given by the Rule of 78's was much smaller than that given by the actuarial method. This also was the finding of the Court in *Bone v. Hibernia Bank*, 493 F. 2d 135, 137, 140 (9th Cir. 1974). A Louisiana debtor would be compelled to pay an additional charge equal to the rebated unearned finance charge."

407 F.Supp. at 781. The Federal Reserve Board, on the other hand, in its official interpreations of the Act included as part of Regulation Z has stated in the context of prepayment:

"[A]lthough in a precomputed obligation the finance charge rebate to a customer may be less when calculated according to the 'Rule of 78's,' 'sum of the digits,' or other method than if calculated by the actuarial method, such difference does not constitute a penalty charge for prepayment that must be described. . . ."

12 C.F.R. § 226.819. It is certainly reasonable to assume that if the Board does not consider that the use of the Rule of 78's entails a penalty charge when a consumer prepays an obligation, the Board would take the same position as to the use of the Rule when payment is accelerated.

We decline to come to grips with this complex question because we find that the defendants were justified in relying in good faith on the Board's statement in 12 C.F.R. §226.819, whether or not the Rule of 78's in fact penalizes the consumer. Such a defense is authorized by the Act at 15 U.S.C.§ 1640(f):

> "No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason."

In sum, we conclude that the failure to disclose the acceleration clause on the face of the disclosure statement, or on a separate statement identifying the transaction was not in this case a violation of the Truth in Lending Act.

WHO IS LIABLE?

We have found that the only violations of the Truth in Lending Act were the excessive charges for the notary's fee and for license, title and registration fees. There is no dispute that defendant Bill Watson Ford was the one who supplied these excessive figures in its completion of the disclosure statement. However, Watson argues that Ford Motor Credit should also be liable for these violations under the "conduit theory". According to that theory, a party who is technically a subsequent assignee of a credit obligation may be deemed to be a "creditor" within the meaning

of the Truth in Lending Act if that party in essence arranges for the extension of credit, using the original creditor as a mere conduit. As a "creditor", the assignee is equally liable for violations of the Act. See Garza v. Chicago Health Clubs, Inc., N.D. Ill. E.D. 1972, 347 F.Supp. 955; Meyers v. Clearview Dodge Sales, Inc., E.D. La. 1974, 384 F.Supp. 722. The courts first fashioned the conduit theory in order to fill an apparent gap in the provisions of the Truth in Lending Act. Since that time, Congress has closed that gap by the enactment of a new provision, 15 U.S.C. § 1614 dealing with the liability of assignees:

> "Except as otherwise specifically provided in this subchapter, any civil action for a violation of this subchapter which may be brought against the original creditor in any credit transaction may be maintained against any subsequent assignee of the original creditor where the violation from which the alleged liability arose is apparent on the face of the instrument assigned unless the assignment is involuntary."

While § 1614 does not invalidate the conduit theory, it precludes the necessity of resort to that theory in most cases. Johnson v. Johnson, M.D. Ga. 1975, CCH Consumer Credit Guide ¶ 98,566. It is clear that under the terms of § 1614, Ford Motor Credit would not be liable, since the violations in this case are not apparent on the face of the instrument. We are convinced from the testimony given at trial that Ford Motor Credit was not in fact aware that Watson habitually overcharged its customers for these particular items. In fact, when Ford Motor Credit did finally learn of this practice, it notified Watson that it would no longer deal

with them unless they thenceforth collected only the precise amount due for these items and reported the same on all future disclosure statements. Even under the conduit theory, we have found no case which would hold a finance company liable for violations committed by a seller of which it proved it had no knowledge. *We must conclude that only defendant Bill Watson Ford is liable for the Truth in Lending violations in this case.*

Therefore, IT IS ORDERED, that judgment be entered in favor of the plaintiff DEBORAH A. WILLIAMS and against the defendant BILL WATSON FORD.

New Orleans, Louisiana, September 27, 1976.

s/ Morey L. Sear
Morey L. Sear
UNITED STATES DISTRICT
JUDGE

APPENDIX J (2)

SUPPLEMENTAL OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: Nov 22, 1976

DEBORAH A. WILLIAMS	CIVIL ACTION
VERSUS	NO. 74-3379
BILL WATSON FORD, INC. and FORD MOTOR CREDIT CO.	SECTION G

SUPPLEMENTAL OPINION

SEAR, District Judge:

Plaintiff and defendant Bill Watson Ford, Inc., both seek to have us re-examine our finding of exclusive liability on the part of Watson in light of the Fifth Circuit's opinion in Meyers v. Clearview Dodge Sales, Inc., ___F.2d___ (5 Cir. Sept. 27, 1976). Before confronting that issue, however, it is necessary that we correct an error in our earlier opinion as to the provisions of Louisiana law applicable to this case.

CREDIT SALES OF AUTOMOBILES

Considering whether Louisiana law requires a rebate of unearned interest upon acceleration of a debt, we focused on Burley v. Bastrop Loan Co., W.D. La. 1976, 407 F.Supp. 773, the only case containing a thorough discussion of this

issue as it relates to the Truth in Lending Act. However, the credit transaction in *Burley* did not involve the sale of an automobile as in this case. *Burley* referred to certain provisions of the Louisiana Consumer Credit Law enacted in 1972, effective January 1, 1973. As originally proposed, the Louisiana Consumer Credit Law was to regulate all consumer credit transactions, including those involving the sale of motor vehicles. *See* House Bill No. 699 of the 1972 Legislative Session. However, the bill was amended prior to its effective date to exempt transactions made pursuant to the Motor Vehicle Sales Finance Act. La. R.S. 9:3512(4).

Since this case involves the sale of an automobile, the applicable Louisiana law at the time of the transaction was La. R.S. 6:968 (since repealed). This provision was put into force by the same act containing La. R.S. 9:3529, the provision discussed in the *Burley* case and our first opinion. Act 454 of 1972. We presume that the Louisiana legislature drafter La. R.S.:6:968 to fill the gap left by the exclusion of transactions involving motor vehicles from the Louisiana Consumer Credit Law. In any case, La. R.S. 6:968 and La. R.S. 9:3529 are essentially identical and are set out below with non-conforming portions italicized:

> *"La. R.S. 6:968 (since repealed):* If the maturity *on any Retail Installment Transaction* is accelerated for any reason and suit is filed, the obligation shall be credited with the same rebate as if pre-payment in full had been made on the date of filing of suit, thereafter the obligation sued upon shall be deemed to bear a finance charge on the amount due not to exceed the rate previously charged on the obligation.

> *"La. R.S. 9:3529: Except as provided in R.S. 9:3525,* if the maturity is accelerated for any reason and suit is filed, the obligation shall be credited with the same rebate as if prepayment in full had been made on the date of filing of suit, thereafter the obligation sued upon shall be deemed to bear a *loan* finance charge *or credit service charge* on the amount due not to exceed the rate previously charged on the obligation."

In both statutes, the method of rebate or refund referred to is the Rule of 78's.

Therefore, for the same reasons set forth in our first opinion relative to La. R.S. 9:3529, we hold that La. R.S. 6:968, the applicable Louisiana law at the time of the transaction in this case requires that unearned interest be rebated upon acceleration, and that the acceleration clause in this contract imposes no additional expense upon the consumer and is not a "charge" which must be revealed pursuant to 15 U.S.C.§ 1638(a)(9) and 12 C.F.R.§ 226.8(b) (4).

Moreover, we note that this result accords with the position of the Fifth Circuit as revealed in Martin v. Commercial Securities, Inc., ___F.2d___(5 Cir. Sept. 27, 1976), which, like the *Meyers* case, was issued on the same day as our original opinion.

EFFECT OF MEYERS V. CLEARVIEW DODGE SALES, INC.

Both plaintiff and defendant Bill Watson Ford have urged that we overturn our previous determination that

Ford Motor Credit Company is not liable on the facts of this case. They refer us to the recently rendered decision in Meyers v. Clearview Dodge Sales, Inc., ___F.2d___ (5 Cir. Sept. 27, 1976), in which the Fifth Circuit found both an automobile dealer and a finance company liable in similar circumstances. While we recognize the substantial similarities between the instant case and *Meyers*, we find that the *Meyers* case is not controlling of the allocation of liability here because of the provisions of 12 C.F.R.§ 226.6(d), a section of Regulation Z which was not considered by *Meyers* in this context.

In our first opinion we declined to determine the status of Ford Motor Credit, holding that whether Ford Motor Credit was a mere assignee under 15 U.S.C. § 1614 or a creditor under the conduit theory, Ford Motor Credit would not be liable under the facts as we found them. In view of *Meyers*, there is no longer any doubt that Ford Motor Credit was indeed a creditor. The following excerpt from *Meyers* if a simple substitution of names is made seems tailor-made for the present case:

> "It is undisputed that Clearview [Watson] is in the business of selling automobiles and does not ordinarily finance credit sales itself. Instead, when the purchaser has not made financing arrangements of his own, Clearview [Watson] takes a financial statement and submits it to several institutional creditors with whom it regularly deals for approval of the purchaser's credit. If any one of the lenders approves the customer's credit, Clearview [Watson] completes the sale and immediately assigns the commercial papers to an approving lender. This practice of prearranging

> the assignment of commercial paper is a regular and essential part of Clearview's [Watson's] business and is, as the district court concluded, tantamount to arranging for the extension of credit. *Meyers, supra*, at 728. Consequently, in this factual setting, both appellants are 'creditors' under the Act, Clearview [Watson] as the credit arranger and Chrysler Credit [Ford Motor Credit] as the credit extender."

Id. at 5946.

Since, following *Meyers*, we find that both Watson and Ford Motor Credit were creditors under the Truth in Lending Act, in order to allocate liability between the two, we must look to the provisions of 12 C.F.R.§ 226.6(d) which regulates disclosure when there are multiple creditors.

> "If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and the purview of his relationship with the customer. If two or more creditors make a joint disclosure, each creditor shall be clearly identified. The disclosures required under paragraphs (b) and (c) of § 226.8 shall be made by the seller if he extends or arranges for the extension of credit. Otherwise disclosures shall be made as required under paragraphs (b) and (d) of § 226.8."

Meyers referred only briefly to § 226.6(d) in a footnote.

the Court used § 226.6(d) to illustrate that although there were multiple creditors, there was only one credit sale and one disclosure statement. It concluded that only one penalty should be imposed – the amount of the penalty to be split between those liable. In short, the Fifth Circuit considered § 226.6(d) only insofar as it implies a "single recovery" rule; the Court did not deal with § 226.6(d) in any other aspect.

There have been few judicial interpreations of this relatively new Truth in Lending regulation. One was offered by the Third Circuit in Manning v. Princeton Consumer Discount Co., 3 Cir. 1976, 533 F.2d 102. In that case the plaintiff arranged to buy a used car from the seller. The seller then made certain preparations with the defendant finance company and drove the plaintiff to the finance company where she signed documents, received a disclosure sheet and received a check which she in turn endorsed to the seller for the car. The finance company made *consumer loan* disclosures. However, neither the finance company nor the seller made any of the *credit sale* disclosures required by the Truth in Lending Act. The Court found that the transaction when viewed as a whole was indeed a credit sale, and that both the seller and the finance company were creditors. It then considered whether one or both were liable for the failures to disclose.

> "While § 121, 15 U.S.C. § 1631, says that each creditor shall disclose to each person the information required, the Board has not considered that section as being applicable to the multiple creditor transaction. Practical considerations lead to the conclusion that needless duplication of information extended to consumers is neither necessary to the Act's purpose nor justifiable

> in terms of expense. To clarify the situation, the Board promulgated a regulation, 12 C.F.R. §226.6(d). . . .
>
> "In short, we hold that if the transaction is one in which the seller arranges credit, the obligation of disclosure is placed upon him by the third sentence of Regulation § 226.6(d). In that factual situation the specific direction of the third sentence prevails over the general language limiting the scope of disclosure to items within the creditor's knowledge and the purview of his relationship with the customer.
>
> "If the seller is divorced from the credit arrangement, then the lender must supply the information which pertains only to the amount of money being received and its cost, without reference to the underlying sales transaction. Because the burden of full disclosure was placed upon the seller, it is our view that if additional and duplicative disclosure had been intended, the regulation would have set that forth with equal explicitness."

Id. at 105-06. *Manning* therefore found the seller solely liable in a multiple creditor situation. *See also* Boggan v. Euclid National Bank, N.D. Ohio 1974, CCH Consumer Credit Guide ¶98,674.

The Tenth Circuit in the recently decided *Hinkle v. Rock Springs National Bank*, 10 Cir. 1976, 538 F.2d 295 took a different approach to § 226.6(d). That case involved the

credit sale of a mobile home to the plaintiff. The Court found that both the seller, Adams Sales, and the bank which made the loan were creditors within the meaning of the Truth in Lending Act, and found both liable for the failure to disclose. The particular facts of the case are necessary to an understanding of the Court's conclusion:

> "The record shows that Adams, as seller of the mobile home, used sales agreement forms provided by the defendant Bank, but Adams had much of the information which should have been included in the disclosures, as contemplated by the forms and otherwise. It appears that there was some sort of a continuing business relationship between Adams and the Bank. There was testimony that Adams relied on the Bank for guidance on meeting various legal requirements. It also appears that the plaintiffs had previous dealings with the Bank.
>
> "As to the Bank, it also was to provide information necessary for the completion of the disclosure requirements. It was to provide the interest rate upon which, of course, other computations basic to the cost of credit depended, including the amount of the installments and the total finance charges. Adams apparently did not have the interest rate at the time he negotiated with the plaintiffs. The fact that the seller, Adams, could have made inquiry to determine it, and make the computations, makes no difference in view of the fact it did not do so. The Bank was the payee of the installment note later executed by the plaintiffs, and delivered by Adams to the Bank.

> "It is apparent that Adams and the Bank each hid information required to be disclosed. . . . Regulation Z contemplates that when there are several 'creditors' they each shall be responsible for disclosures which are within the scope of its relationship with the consumer. 12 CFR §226.6 (d) and of data they possess."

Id. at 296-97. Although the Court found both the seller and the Bank liable, *Hinkle* does not authorize the automatic imposition of liability on each party found to be a creditor. Instead, the Court discussed the areas in which each had fallen short. Its finding of liability was predicated on a determination that both the seller and the Bank had each failed to make disclosures "which [were] within the scope of its relationship with the consumer . . . and of data they possess."

We believe that the *Hinkle* case represents the more reasoned view of §226.6(d), and the one best supported by the language of that provision. The conclusion reached by the *Manning* case hinged entirely on the final sentence of §226.6(d):

> "The disclosures required under paragraphs (b) and (c) of §226.8 shall be made by the seller if he extends or arranges for the extension of credit. Otherwise disclosures shall be made as required under paragraphs (b) and (d) of §226.8."

But this sentence does not impose exclusive liability on the seller. Rather, it is a mere mechanical directive in order to eliminate confusion when multiple creditors issue a single disclosure statement. It requires that when a joint dis-

closure is made, as referred to in the immediately preceding sentence, the seller is the one who must physically deliver the disclosure statement to the consumer. The sentence is not phrased in terms of an allocation of liability. In fact, the only possible liability which could attach by virtue of this sentence is isolation from the rest of the provision, would be in the case when the seller gives the consumer no disclosure statement at all. Liability is dealt with in the first sentence of §226.6(d) which speaks of who "shall be *responsible*", not the third sentence which speaks of who shall *make* the disclosures. In view of the fact that in multiple creditor situations, it is often only the seller who has any personal contact with the cosumer, placing the duty of delivery on the seller makes good sense.

The first sentence of §226.6(d) is a general instruction on the allocation of liability among multiple creditors.

> "If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and the purview of his relationship with the customer."

The test posed by this sentence applies whether each creditor issues his own disclosure statement or whether all creditors issue one joint statement. The test is two-pronged. Before finding one particular creditor among multiple creditors liable for a failure to disclose, it must be determined that (1) the information withheld was within his knowledge, and (2) the information withheld was within the purview of his relationship with the customer.

In our original opinion we found that the failure to disclose the exact amount of the notary's fee, and the failure to disclose the correct amount of license, title and registration fees were violations of the Truth in Lending Act. Clearly the latter item is only "within the knowledge" of the seller Watson. These fees must be collected for every car sold, whether or not it is a credit sale. In every case Watson makes all arrangement concerning these fees and forwards the money to the correct State agency. This is within the "purview" of the seller-consumer relationship.

We also find that in this case the precise amount of the notary's fee was an item solely "within the knowledge" of the seller Watson and within the "purview" of its relationship with the plaintiff. Watson employed the notary on retainer. Ford Motor Credit never saw the notary or had anything to do with him.

Therefore, despite the fact that we find both Watson and Ford Motor Credit were creditors under the *Meyers* case, we find that only Watson is liable for the particular violations in this case in accordance with the terms of 12 C.F.R. §226.6(d).

New Orleans, Louisiana, this 19 day of November, 1976.

s/ Morey L. Sear
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

APPENDIX K

SPECIAL RELEASES -- CORRESPONDENCE

[¶30,935] "DOCUMENTARY AND MAKE-READY FEES"

[This is on] the proper treatment under Regulation Z of certain "documentary and make-ready fees." Your inquiry relates to our public information letter # 623 [CCH *Consumer Credit Guide* ¶ 30,872] dated August 9, 1972, concerning the treatment of certain fees in connection with a credit sale of an automobile.

While we share your concern about what appears to be deception in orally quoting a price of an automobile which does not include fees later assessed, the response in our letter #623 [CCH *Consumer Credit Guide* ¶30,872 on the technical Regulation Z question was based on the information that the "documentary and make-ready fees" were assessed in cash sales as well as extensions of credit and the fees were exactly the same in either case. From your letter it appears that the $30 fee in question is added to all sales. Thus the definition of "cash price" in § 226.2(i) [¶3510] to mean the price at which the creditor offers to sell for cash is persuasive. Staff also reasoned that such fees do not fall within the finance charge designation under §226.4 [¶ 3518] in that they are not charges "payable directly or indirectly by the customer and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit." Furthermore, staff reasoned that since these charges do not fall under § 226.4 (b) [¶3519], they need not be itemized and disclosed to the customer in order to be excludable from the finance charge

and the language in the definition of "cash price" that it "shall not include any other charges of the types described in §226.4 [¶3518]" was not an impediment to inclusion of the charges. Staff believes that the fees could be included in the cash price under § 226.2(i) [¶3510] and the disclosures of §226.8(c)(1) [¶3566] or they could be included in other charges under §226.8(c)(4) [¶3567]. The Regulation does not prescribe one treatment over the other.

After again reviewing its letter #623 [CCH *Consumer Credit Guide* ¶30,872], staff believes that the positions taken in that letter reflect the requirements of Regulation Z, although, as indicated, we share your concern about a practice which may otherwise be objectionable.

Excerpts from FRB Letter of January 23, 1973 by Jerauld C. Kluckman, Accountant – Analyst.

APPENDIX L (1)

OPEN LETTER TO ALL LICENSED CALIFORNIA VEHICLE DEALERS AND MANUFACTURERS

Office of the Director
Department of Motor Vehicles
2113 First Avenue

18 Jan 72

OPEN LETTER TO ALL LICENSED CALIFORNIA VEHICLES DEALERS AND MANUFACTURERS

When a "Documentary Fee" is charged by a dealer, this fee *MUST* be *included* in the total cash price of the vehicle on the contract or purchase order.

Sales tax is chargeable on the total price (including accessories and services, such as "documentary fees") of the vehicle.

TOTAL PRICE, as defined in Section 433.00, Title 13, California Administrative Code, shall include all costs to the purchaser at the time of delivery at the dealer's premises, except *sales tax, vehicle registration fee and finance charges.* In no case shall a dealer advertise a price in such a manner as to lead the purchasing public to believe it is a total price when it is not.

CASH PRICE, as defined in Section 2981(c), California Civil Code, means the amount for which the seller would

sell and transfer unqualified title to the motor vehicle described in the conditional sales contract, if the property were sold for cash at the seller's place of business on the date the contract is executed and may include taxes to the extent imposed on the cash sale and the cash price of accessories or services related to the sale, such as delivery, installation, alterations, modifications and improvements.

TOTAL PRICE = Vehicle + Accessories and Services
CASH PRICE = Vehicle + Accessories and Services + Sales Tax
PURCHASER'S COST = Cash Price + Registration and Financing

APPROVED:

s/ Robert C. Cozers
Director

s/ F.J. Watson
F.J. WATSON, Manager
Compliance Services

APPENDIX L(2)

LETTER FROM OFFICE OF CONSUMER CREDIT COMMISSIONER

State of Texas

OFFICE OF CONSUMER CREDIT COMMISSIONER

Post Office Box 2107 1101 San Jacinto Boulevard
Austin, Texas 78767 512 / 475-211

January 11, 1974

Mr. I. J. Berrier
Executive Vice President
Texas Independent Automobile Dealers Association
3011 North Interregional Highway
Austin, Texas 78722

Dear Mr. Berrier:

I have enclosed a copy of the Classification and Rate Chart for Chapter 7 transactions which may be of some benefit to your members.

A problem that we have encountered in examining some automobile dealer paper is the inclusion of a "documentary fee" as a charge in the Retail Installment Contract. The term "documentary fee" has been used to represent the costs of various services performed by the seller or expenses incurred by him such as notary fees, preparation of the contract and/or title papers, obtaining license plates for the buyer, etc. Such a fee *may not be* separately identified as

a charge on the Retail Installment Contract.

The Texas Credit Code provides that a seller may include in the contract a charge for "Official Fees" which is defined as ". . . the amount of fees prescribed by law for filing, recording or otherwise perfecting and, in addition, for releasing or satisfying a retained title, lien or other security interest created in connection with a retail installment transaction." Although the Code provides no authority to charge a "documentary fee," this Office has not objected to a seller including such a fee in the *Cash Price* of the vehicle if the documentary fee is a *customary charge for both cash and credit customers.*

It is our practice to ask that the "documentary fee" be refunded to the buyer when the fee is separately disclosed on the Retail Installment Contract.

In accordance with our telephone conversation, I will advise you if any other problems develop that might be of general interest to you and your members.

Yours very truly,

s/ Edgar L. Scott
Edgar L. Scott

Supreme Court, U. S.
FILED
APR 29 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76 - 1257

CHRYSLER CREDIT CORPORATION,
Petitioner

Versus

CHERYL A. MEYERS, and
CLEARVIEW DODGE SALES, INC.
Respondents

AND

NO. 76 - 1352

CHERYL A. MEYERS,
Petitioner

Versus

CHRYSLER CREDIT CORPORATION AND
CLEARVIEW DODGE SALES, INC.
Respondents

CHRYSLER CREDIT CORPORATION'S REPLY BRIEF IN NO. 76-1257 AND BRIEF IN OPPOSITION IN NO. 76-1352

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-1257

CHRYSLER CREDIT CORPORATION,
Petitioner

Versus

CHERYL A. MEYERS, and
CLEARVIEW DODGE SALES, INC.,
Respondents

AND

NO. 76-1352

CHERYL A. MEYERS,
Petitioner

Versus

CHRYSLER CREDIT CORPORATION AND
CLEARVIEW DODGE SALES, INC.,
Respondents

CHRYSLER CREDIT CORPORATION'S REPLY BRIEF IN NO. 76-1257 AND BRIEF IN OPPOSITION IN NO. 76-1352

On March 10, 1977 Chrysler Credit Corporation ("Chrysler Credit") filed its petition for writ of certiorari in No. 76-1257. On April 2, 1977 Cheryl A. Meyers, a respondent in No. 76-1257, filed her conditional cross-petition for writ

of certiorari in No. 76-1352; her petition included a brief in opposition to Chrysler Credit's petition. In this reply and opposition brief, Chrysler Credit limits itself to corrections of basic misstatements and faulty analysis in Ms. Meyers' petition, reserving for a brief on the merits a full argument of the issues presented by both petitions.

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit to which these petitions are addressed is reported at 539 F.2d 511 and is reproduced beginning at page A-1 of the appendices to Chrysler Credit's petition in No. 76-1257. The Court of Appeals' order denying Chrysler Credit's petition for rehearing was issued without opinion; it is reproduced at page A-28 of the appendices to Chrysler Credit's petition.

The opinion on summary judgment of the United States District Court for the Eastern District of Louisiana that was the subject of the appeals to the Court of Appeals is reported at 384 F. Supp. 722 and is reproduced beginning at page A-30 of the appendices to Chrysler Credit's petition.

II.

JURISDICTIONAL STATEMENT

Chrysler Credit adopts by reference the jurisdictional statement appearing at pages 2-3 of its petition in No. 76-1257.

III.

QUESTIONS PRESENTED

In addition to the questions presented in Chrysler Credit's petition, Ms. Meyers' petition purports to raise the following questions, and no others:

1. Whether the Court should overrule the Court of Appeals' holding that the conditional deferred portion of the purchase price payable to the seller of a consumer credit obligation need not be disclosed as a "component" of the finance charge, where that Court of Appeals is the only one to have considered the question and its holding is supported by a formal interpretation of the Federal Reserve Board on April 4, 1977. (Meyers' Question No. 4.)

2. Whether this Court should disregard the formal interpretation of the Federal Reserve Board providing that where a finance charge includes only a single component--*i.e.*, a time-price differential--a description of the "components" of the finance charge is not required. (Meyers' Question No. 5.)

3. Whether a creditor's omitting to disclose its right to accelerate payments upon the debtor's default can properly be held a violation of the Federal Truth in Lending Act, when neither the Act nor Regulation Z resquires such a disclosure. (Meyers' Question No. 6.)

4. Whether a confession of judgment clause in a Louisiana chattel mortgage which affects only the mortgaged property, is, in and of itself, a security interest within the meaning of the Truth in Lending Act and must be dis-

closed in addition to the chattel mortgage in which the clause appears. (Meyers' Question No. 7.)

We respectfully submit that the answer to each of these questions is, "No."

IV.

STATUTES AND REGULATIONS INVOLVED

These petitions raise questions as to the interpretation of the Federal Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, and the Board of Governors of the Federal Reserve System's Regulation Z, 12 C.F.R. Part 226. Pertinent provisions of the statute are reproduced beginning at page A-50 of the appendices to Chrysler Credit's petition in No. 76-1257; pertinent provisions of Regulation Z are reproduced beginning at page A-54 of those appendices.

V.

STATEMENT OF THE CASE

Chrysler Credit adheres to and adopts by reference the Statement of the Case in its petition.

The Statement of the Case in Ms. Meyers' petition is misleading in several respects.

In the third paragraph on page 4, and elsewhere in her petition, Ms. Meyers uses the term "finder's fee," and suggests that the term was used by Chrysler Credit and Clearview in the documents they prepared. This is not so. The documents demonstrate that both Chrysler Credit and

Clearview regarded the transaction as a credit sale by Clearview to Ms. Meyers, followed by Clearview's sale to Chrysler Credit of Ms. Meyers' obligations. The sum that Ms. Meyers seeks to characterize as a "finder's fee" was the dealer's participation, or conditional deferred portion of the purchase price of the Meyers contract available to Clearview from Chrysler Credit if Ms. Meyers paid as she agreed. The Court of Appeals, of course, flatly rejected Ms. Meyers' "finder's fee" characterization.

Ms. Meyers' reference to and reliance upon Clearview's "Corporate Form Signatory Authorization"[1] are also misplaced. This document relates only to Clearview's "purchases . . . of new motor vehicles," *i.e.*, its *wholesale* financing. It has nothing to do with the issues in this case.

Ms. Meyers makes the assertions in her Statement of the Case apparently to support the position she assumes later in her petition--that Chrysler Credit was the "credit extender." This misconception is at the heart of the case.

Chrysler Credit has never denied that it became a creditor in the general sense of that term, or that it accordingly became subject to appropriate disclosure obligations under the Truth in Lending Act. Chrysler Credit, however, became a creditor of Ms. Meyers by accepting from Clearview a bearer note and a chattel mortgage that named Clearview as mortgagee. It was Clearview, then, who "extended" the credit; Chrysler Credit was a subsequent assignee subject to the obligations -- and protections -- of 15 U.S.C. §§1614 and 1641.

---

1. Meyers' Petition, p. 4, ¶4; see also appendix 4 to the Meyers petition.

VI.

ARGUMENT

A. *Reply to Ms. Meyers' Brief in Opposition*

1. THERE IS A SIGNIFICANT CONFLICT BETWEEN THE COURT OF APPEALS' HOLDING IN THIS CASE AND THE THIRD CIRCUIT'S HOLDING IN *MANNING*

Ms. Meyers argues that the Court of Appeals' holdings in *Meyers* and *Manning*[2] are consistent because each held the financial institution to have been a creditor. While the premise of her argument is correct, it completely misses the point.

The conflict that Ms. Meyers has failed to perceive could not be more explicit--in one case the financial institution was held liable for credit sale disclosures; in the other case, although held a creditor, the financial institution was held *not* liable for credit sale disclosures.

The *Manning* holding of non-liability was based upon section 226.6(d) of Regulation Z, which apportions liability among multiple creditors on the basis of each creditor's "knowledge and the purview of his relationship with the customer . . ." The same section mandates that in credit sales the appropriate disclosures, "shall be made by the seller if he extends or arranges for the extension of credit . . ."

---

2. *Manning v. Princeton Consumer Discount Co.*, 533 F.2d 102 (3d Cir.), *cert. denied*, _U.S._, 50 L.Ed. 2d 144 (1976).

The Court of Appeals in *Manning* simply followed this mandate when it exculpated the financial institution. The Court of Appeals in *Meyers* declined to consider the section at all.[3] The direct conflict between the decisions in *Manning* and *Meyers*, therefore, raises an important question, which only this Court can answer definitively--does the regulation mean what it says, as held in *Manning*, or should it be judicially rescinded, as apparently held in *Meyers*?

2. MS. MEYERS' ANALYSIS OF THE *JOSEPH, MIRABAL* AND *HINKLE* CASES IS WRONG

Chrysler Credit has asked this Court to resolve the conflict between this case and *Manning* by correctly characterizing Chrysler Credit as a subsequent assignee and by applying the portions of the Truth-in-Lending Act that limit an assignee creditor's liability in the same manner that Regulation Z's section 226.6(d) limits a multiple creditor's liability in a credit arrangement. The section of the Act thus invoked by Chrysler Credit is section 1641, which appropriately limits the liability of a subsequent assignee to violations of which it has knowledge or which were apparent on the face of the assigned document.[4] It is difficult to imagine a case in which the statute would apply, if it does not apply here.

---

3. Ms. Meyers is correct in arguing that the Court of Appeals cited section 226.6(d). See note 22 at 539 F.2d 521. The Court of Appeals did not, however, cite or discuss the section's language apportioning responsibility in credit sales and did not attempt to meet Chrysler Credit's arguments in this regard.

4. ". . .[I]n any action or proceeding by or against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgement of receipt by a person to whom a statement is required to be given pursuant to this subchapter shall be conclusive proof of the delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this part . . ." 15 U.S.C. §1641. See also 15 U.S.C. §1614.

Plaintiff argues that the lower courts' rejection of section 1641 is consistent with the holdings in *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86 (8th Cir. 1976), *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871 (7th Cir. 1976), and *Hinkle v. Rock Springs National Bank*, 538 F.2d 295 (10th Cir. 1976). None of these cases is apposite.

While in *Joseph* the financial institution was an assignee, it took the position that it was not a creditor at all, and therefore not subject to the Truth in Lending Act. Because at the time the *Joseph* case arose, section 1614's express imposition of limited liability upon an assignee creditor had not been enacted, the Court of Appeals for the Eighth Circuit felt that assignee liability was not clear (532 F.2d at 91, n. 7). The court consequently felt it necessary to fashion the so-called "conduit theory" in order to bring the assignee creditors within the Act's reach.

In the meantime, Congress has made it crystal clear, through the enactment of section 1614, that an assignee is a special kind of creditor. It is subject to liability under the Act, but only for violations it has a fair opportunity to perceive and correct. Chrysler Credit has acknowledged this potential for liability throughout the litigation. There is, therefore, no reason to torture the Act's plain meaning by resorting to the conduit theory.[5]

Nor in the *Mirabal* case was the applicability of sections 1614 and 1641 at issue. The violation found, a misstatement of the annual percentage rate, was one with respect

5. Another reason for the Eighth Circuit's inclination to stretch the general liability provisions of the Act to include assignees may have been the involuntary bankruptcy of Norman's Health Club, Inc., the assignor (532 F.2d at 88, n.1).

to which the financial institution was chargeable with knowledge and which was or should have been "apparent on the face of the statement." The financial institution would thus have been liable even if it had sought to invoke the Act's provisions respecting assignees.

The *Hinkle* case is not in point because there was no assignment involved; the financial institution was named as the payee of plaintiffs' note, and there was consequently no reason or attempt to invoke section 1641. Additionally, because the violation resulted from the defendants' furnishing the plaintiffs with a blank disclosure statement,[6] the financial institution would not have enjoyed the limited protection provided by either section 1641 or Regulation section 226.6(d).

The only cases in which the question of section 1641's application has been squarely presented have been *Williams v. Bill Watson Ford, Inc.*, E.D. La. No. 74-3379 (1976), reproduced at pages A-81 (Opinion) and A-99 (Supplemental Opinion) of the appendices to Chrysler Credit's petition, and *Chrysler Credit Corp. v. Barnes*, 126 Ga. App. 444, 191 S.E. 2d 121 (1972).

The *Williams* case involved facts nearly identical to those at bar. Placing principal reliance on section 1614, the court initially held:

> "It is clear that under the terms of § 1614, Ford Motor Credit would not be liable, since the violations are not apparent on the face of the in-

6. See prior opinion *sub nom Stevens v. Rock Springs National Bank*, 497 F.2d 307, 309 (10th Cir. 1974).

> strument. . . . Even under the conduit theory [which the court had found to have been obviated by section 1614], we have found no case which would hold a finance company liable for violations committed by a seller of which it proved it had no knowledge. *We must conclude that only defendant Bill Watson Ford is liable for the Truth in Lending Violations in this case."* See pp. A-97-98 of the appendices to Chrysler Credit's petition (Emphasis by the court).

In its supplemental opinion, issued after the Court of Appeals' decision in this case, the District Court in *Williams* affirmed its holding of non-liability on the basis of Regulation Z section 226.6(d). See pp. A-101-09 of the appendices to Chrysler Credit's petition.

The first case to reach the question of section 1641's applicability, on facts identical to those at bar, was *Chrysler Credit Corp. v. Barnes, supra.* The plaintiff sued Chrysler Credit for wrongful seizure and truth-in-lending violations. As to the latter, the court sustained Chrysler Credit's claim that it was a subsequent assignee and its invocation of section 1641.

> "Plaintiff admits signing the 'Retail Installment Contract,' and directly above her signature the following appears: 'Buyer acknowledges receipt of a completely filled-in copy of this contract.' We are pointed to no violation apparent on the face of the contract, and the evidence is clear that Chrysler had no knowledge of the claimed non-delivery or other noncompliance." 191 S.E. 2d at 127.

The facts in this case are exactly the same as those relied upon by the Court in the *Barnes* case. In both cases the dealer was the original creditor; Chrysler Credit was the subsequent assignee creditor to whom section 1641 was clearly applicable.

Chrysler Credit urges that it be exculpated under the rationale of the *Barnes* opinion and the first *Williams* opinion. But even if the credit arrangement characterization that necessitated the second *Williams* opinion is accepted, Chrysler Credit should be exculpated under the rationale of *Manning* and the second *Williams* opinion.

This Court's harmonizing this case with *Manning* by properly characterizing Chrysler Credit as a subsequent assignee will not result in Chrysler Credit's evasion of any responsibilities to which it should properly be subject under the Truth in Lending Act. Rather, such a ruling will tailor Chrysler Credit's responsibilities to the realities of the transaction, and liability will attach when and if a violation results from the financial institution's fault. The vicarious liability imposed by the courts below serves no legitimate truth-in-lending purpose; it was obviously not intended by Congress; and it is unfair.

3. MS. MEYERS' SUGGESTION THAT CHRYSLER CREDIT VIOLATED THE ACT BY FAILING TO IDENTIFY ITSELF AS A CREDITOR IS UNFOUNDED AND IS NOT PROPERLY BEFORE THIS COURT

While the Court of Appeals noted in passing during its recitation of the facts that, "Chrysler Credit was not identified as a creditor, or otherwise, on the face of [the note,

chattel mortgage and disclosure statement]," (539 F.2d at 515, page A-6 of the appendices to Chrysler Credit's petition) the question of such identification has never been an issue in this case. It was neither urged as a violation nor considered *sua sponte* by the courts below. Ms. Meyers' effort to inject it into the case at this point comes too late. We note only that Ms. Meyers herself concedes that Chrysler Credit was labelled as the recipient of the assignment, directly above her signature on the disclosure statement, and that description is accurate.

* * * *

Chrysler Credit will respond in its brief on the merits to the other arguments made in that portion of Ms. Meyers' petition purporting to oppose Chrysler Credit's petition.

B. *Opposition to Ms. Meyers' Conditional Cross-Petition*

4. THE COURT OF APPEALS' HOLDING THAT THE PORTION OF THE FINANCE CHARGE ALLOCATED TO CLEARVIEW WAS NOT A "FINDER'S FEE" AND WAS NOT REQUIRED TO BE DISCLOSED IS CORRECT, AND IT DOES NOT CREATE A CONFLICT WITH ANY OTHER COURT OF APPEALS.

The Court of Appeals correctly refused to hold that the dealer participation on Clearview's sale of Ms. Meyers' note to Chrysler Credit was a "finder's fee" and thus a component of the finance charge.

> ". . .[C]haracterization of the compensation received by Clearview from Chrysler Credit as a 'finder's fee' is alien to the rational meaning of the regulation." 539 F.2d at 517, appendices to Chrysler Credit's petition, p. A-14.

No court of appeals has ruled to the contrary; nor is one likely to do so. The Federal Reserve Board has opined, in a formal interpretation of Regulation Z, that the Regulation does not require the disclosure of a dealer's participation in the finance charge.[7] The final adoption of the interpretation was delayed because the Board was also considering *amending* the Regulation to require disclosure of the fact, but not the amount, of dealer participation. This proposal was eventually withdrawn. See 42 Fed. Reg. 1268 (January 6, 1977) and 42 Fed. Reg. 19124-25 (April 12, 1977). Before taking these actions, the Board elicited and considered many comments from both credit industry and consumer representatives over the course of several months. Obviously, the Board's adoption of a formal *interpretation* rejecting the notion urged in Ms. Meyers' cross-petition, and its proposing and then declining to *amend* the Regulation to require disclosure of the fact of dealer participation, represent the Board's thoroughly considered opinion that the Regulation does not now require disclosure of either the fact or the amount of dealer participation.

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7. 12 C.F.R. §226.821, effective March 28, 1977. See 42 Fed. Reg. 19124-25 (April 12, 1977). The Board had earlier published informal staff opinions to the same effect. F.R.B. Letter of October 21, 1969, CCH Consumer Credit Guide ¶30,197; F.R.B. Letter No. 418, October 30, 1970, CCH Consumer Credit Guide ¶30,602; F.R.B. Letter No. 433, January 21, 1971, CCH Consumer Credit Guide ¶30,627; F.R.B. Letter No. 597, April 28, 1972, CCH Consumer Credit Guide ¶30,841.

Ms. Meyers' fall-back position--that the single component finance charge had to be "itemized" as such--is nonsensical and without merit. The only Court of Appeals decision that supports her argument, *Ives v. W. T. Grant Co.*, 522 F.2d 749 (2d Cir. 1975), was decided before the Federal Reserve Board formally interpreted Regulation Z to the contrary. 12 C.F.R. §226.820.[8]

The judiciary should defer to this interpretation and to the others cited because they represent the "informed experience and judgment of the agency to whom Congress delegated appropriate authority." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 372, 36 L.Ed. 2d 318, 331 (1973).

5. THIS COURT SHOULD NOT DISTURB THE COURT OF APPEALS' HOLDING THAT A CREDITOR'S RIGHT TO ACCELERATE INSTALLMENT PAYMENTS IN THE EVENT OF DEFAULT NEED NOT BE DISCLOSED BECAUSE NEITHER THE ACT NOR THE REGULATION REQUIRES SUCH A DISCLOSURE.

The Court of Appeals' holding that a creditor need not disclose its right to accelerate payments in the event of default is not at odds with the Third Circuit's decision in *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975). The Court of Appeals for the Fifth Circuit

8. The interpretation was recently rescinded when, at the same time, the Board amended the Regulation itself to require "a description of the amount of each type of finance charge" *only* when the total finance charge "consists of two or more types of charges." 12 C.F.R. §226.8(c)(8)(i), as amended, eff. August 6, 1976. See 41 Fed. Reg. 28945-46 (July 14, 1976).

in this case and in *Martin v. Commercial Securities Co.*, 539 F.2d 521 (5th Cir. 1976)[9] held that neither the Act nor the Regulation requires the disclosure of the creditor's right of acceleration. In *Johnson*, the Court of Appeals for the Third Circuit was presented with a narrower question, and it held only that disclosure of the creditor's right of acceleration under Pennsylvania law was not required.

The premise of both decisions was that the right to accelerate, like a creditor's other rights upon default, is not a default or delinquency "charge" within the meaning of section 1638 (a)(9) of the Act and section 226.8(b)(4) of the Regulation.[10] The Court of Appeals for the Fifth Circuit was "in complete agreement with this aspect of the Third Circuit's opinion," and quoted extensively from it. *Martin, supra*, at 539 F.2d 526-527.

Ms. Meyers has urged that the Third Circuit noted Pennsylvania law's requirement of a rebate on all unearned interest upon acceleration, and that the *Johnson* decision stands for the proposition that, where an acceleration rebate formula is mandated by state law and results in something less than a full rebate of unearned interest, then dis-

9. The panel considering this case used the companion case, *Martin*, as its vehicle for the holding on acceleration.

10. See pp. A-51-52 and pp. A-57-58 of the appendices to Chrysler Credit's petition in No. 76-1257. The more detailed regulation provision requires disclosure of, "The amount, or method of computing the amount, of any default delinquency, or similar charges payable in the event of late payments." 12 C.F.R.§ 226.8(b)(4). Chrysler Credit's form discloses the amount of statutory delinquency and default charges. In a recent "official" staff interpretation of Regulation Z pursuant to section 226.1(d)(3), the Board has ruled that a creditor's right to accelerate upon default is not a default charge and need not be disclosed. 42 Fed. Reg. 18056 (April 5, 1977).

closure of the acceleration right is required. Any suggestion to this effect by the *Johnson* Court, however, was at best dictum.

Additionally, the Board's staff has formally opined that so long as unearned finance charges are rebated by the same method disclosed with respect to prepayments, there is no violation. See 42 Fed. Reg. 18056 (April 5, 1977). There is no evidence that Chrysler Credit would have calculated an acceleration rebate by any method other than that which was disclosed with respect to prepayments, *i.e.*, the Rule of 78's.

In any event, the Federal Reserve Board, in another formal interpreation, has ruled that minor differences in rebate calculations are of no truth-in-lending significance:

> "[A]lthough in a precomputed obligation the finance charge rebate to a consumer may be less when calculated according to the 'Rule of 78's,' 'sum of the digits,' or other method than if calculated by the actuarial method, such difference does not constitute a penalty charge for prepayment that must be described pursuant to§ 226.8 (b) (6)." 12 C.F.R. §226.818(b).

Similarly, such a difference does not constitute a default, delinquency or similar charge that must be disclosed pursuant to §226.8 (b) (4). *Evans v. Household Finance Corp.*, CCH Consumer Credit Guide ¶98,678 (S.D. Iowa 1974) (Summary).

Once acceleration is correctly characterized as a creditor's remedy in the event of default, rather than a "charge," the

conclusion that the Act and Regulation do not require its disclosure is inescapable. Other Circuits agree. *Begay v. Ziems Motor Co.*,__ F.2d__ , CCH Consumer Credit Guide ¶98,251 (10th Cir. 1977) (Summary); *c.f. Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 883-84 (7th Cir. 1976). We know of no Court of Appeals decision creating a clear conflict with either of these decisions or with that of the court below.

6. A LOUISIANA CONFESSION OF JUDGMENT IS NOT A SECURITY INTEREST AND NEED NOT BE DISCLOSED.

Not only is there no conflict of authority on the question whether a Louisiana confession of judgment must be disclosed as a security interest, the question has never been seriously raised by anyone but Ms. Meyers.

The formal interpretation relied upon by Ms. Meyers, 12 C.F.R.§ 226.202, requires creditors to disclose the kinds of confession of judgment and cognovit clauses that permit creditors to obtain a judgment lien against *any* property owned by the debtor. Such a clause obviously creates a security interest in property other than the subject of the credit sale.

In Louisiana, a confession of judgment is simply a procedural prerequisite to a mortgagee's seizure of the *mortgaged property* through executory process, which is an *in rem* proceeding and cannot affect property other than that subject to the mortgage. *Ross v. Brown Title Corp.*, 356 F.Supp. 595 (E.D. La.), *aff'd*, 412 U.S. 934 (1973);[11] Mc

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11. The statement from *Ross* quoted at p. 20 of Ms. Meyers' petition is meaningless in the context of this case. The three-judge panel

(Footnote continued on next page)

Mahon, *The Historical Development of Executory Procedure in Louisiana,* 32 Tul. L. Rev. 555, 570-71 (1958).

Because of this critical distinction between Louisiana and common law confessions of judgment, the Federal Reserve Board Staff has informally opined that the Louisiana variety need not be disclosed as a security interest.

> ". . .[T]he clause creates no security interest beyond that taken and presumably disclosed under the mortgage." F.R.B. Letter No. 759, February 28, 1974, CCH Consumer Credit Guide ¶31,081.[12]

Consequently there is no reason to review or disturb the holdings of the courts below on this issue.

VII.

CONCLUSION

For the reasons recited here and in Chrysler Credit's petition, the Court should grant the writ to review the important questions raised by that petition. The lower federal courts are in substantial need of guidance, and the validity

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(Footnote 11 continued from previous page.)
merely noted that Louisiana's executory process was procedurally "more closely akin to the common law cognovit *procedures*" than to the replevin procedures held unconstitutional in *Fuentes v. Shevin,* 407 U.S. 67, 32 L.Ed. 2d 556 (1972), 356 F.Supp. at 600 (Emphasis added). The panel did not discuss the reach of executory process beyond the mortgaged property; as noted above, there is none.

12. The disclosure statement in this case disclosed the existence of a "mortgage, lien and privilege" on Ms. Meyers' automobile.

of many thousands of consumer credit transactions is at stake.

The questions that Ms. Meyers' petition purports to raise are either (1) of little importance to consumers and creditors, or (2) they have been fully considered and decided by the courts and the Federal Reserve Board. The writ should therefore issue for the limited purpose of reviewing the errors to which Chrysler Credit's petition is addressed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Chrysler Credit Corporation certifies that he is a member of the bar of this Court and that he has caused service of three copies of the within brief to be made upon the following counsel of record: Patrick D. Breeden, 1120 Hibernia Bank Building, New Orleans, Louisiana, 70112; and Robert E. McDonald, 3500 N. Causeway Blvd., Suite 160, Metairie, Louisiana, 70002, pursuant to Rule 33(1), by placing the said copies in the United States mail addressed to their post office addresses with first class postage prepaid, this 28th day of April, 1977.

JAMES K. IRVIN

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